

(26,843)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 757.

THE SOUTH COVINGTON AND CINCINNATI STREET RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Twenty-seventh Day of September, 1918.

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
Appellant,

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Kenton Circuit Court, Criminal, Common Law, and Equity Division.

Be it remembered that heretofore to-wit: on the 8th day of August 1917, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals a transcript of the record, which is in words and figures as follows, to-wit:

Pleas before the Honorable the Kenton Circuit Court, at the Court-house, in Covington, on the 13th Day of June, 1917, Honorable F. M. Tracy, Judge Presiding, Criminal, Common Law, and Equity Division.

COMMONWEALTH OF KENTUCKY

vs.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation Organized under the Laws of the Commonwealth of Kentucky.

Be it remembered, that on the 19th day of February, 1916, the Grand Jury of Kenton County, returned the following Indictment:

Indictment.

#3094.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation Organized under the Laws of the Commonwealth of Kentucky, Defendant.

The Grand Jury of Kenton County, in the name and by the authority of the Commonwealth of Kentucky, accuse

the South Covington and Cincinnati Street Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky of the offense of unlawfully running and operating a coach or car by electricity on a railroad track on the — day of February, 1915, within this State and County, without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for white and colored passengers, and without having its coach or car divided by a good and substantial wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, that said defendant then and there had authority and was authorized to operate a line of railroad ten miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership and lease of and from the Cincinnati, Covington and Erlanger Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad ten miles in length in this County between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this Commonwealth, said defendant then and there operating said line of railroad, the

4 construction of which by the Cincinnati, Covington and Erlanger Railway Company had theretofore been authorized, committed in manner and form as follows, to-wit:

That the Cincinnati, Covington and Erlanger Railway Company, an interurban railroad company at all times mentioned herein authorized to construct a railroad ten miles in length between Covington and Erlanger and beyond, and having constructed in this County a railroad from the City of Covington to a point on the Lexington Pike near the Buttermilk Pike in said County, was incorporated under and was at all times mentioned herein, a corporation under the general railroad laws of this Commonwealth; that after said Cincinnati, Covington and Erlanger Railway Company had condemned and acquired land for its tracks, the said defendant by lease and acquisition of the rights and privileges of the said Cincinnati, Covington and Erlanger Railway Company, became and was at all times mentioned in this indictment the controller, lessee and operator of said line of railroad, which extended and now extends from the City of Covington to a point on the Lexington Pike near the Buttermilk Pike, as aforesaid; that while the said Cincinnati, Covington and Erlanger Railway Company and the South Covington and Cincinnati Street Railway Company are separate corporations, and were such at all times mentioned herein, the defendant did at all times herein mentioned control and own, operate and enjoy the rights and privileges of the said Cincinnati, Covington and Erlanger Railway company, and did at all times herein mentioned, run operate and control said line of railroad in said County. That the said

5 South Covington and Cincinnati Street Railway Company,

a corporation duly organized and existing in this Commonwealth, being in respect to the operation of said line, an interurban electric railway company, actually authorized under and by reason of its lease from the Cincinnati, Covington and Erlanger Railway Company, and its acquisition of the rights and privileges thereof to operate a railroad ten miles in length in this Commonwealth, between Covington and Erlanger and beyond, and being then and there the lessee and in control of the said Cincinnati, Covington and Erlanger Railway Company, which was at all times herein mentioned, authorized to construct and operate a line of railroad ten miles in length in said County of Kenton between Covington and Erlanger and beyond, on the — day of February, A. D. 1915, and within twelve months next before the finding of this indictment, said defendant then and there operating said line of railroad, did unlawfully and wilfully run and operate a railroad coach or car by electricity on a railroad track within this County and State, which line of railroad extends from the City of Covington to a point on the Lexington Pike near the Buttermilk Pike in said County, without causing or having each separate coach for the transportation of the white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and did operate said line of railroad without furnishing separate coaches for the transportation of the white and colored passengers on its line of railroad and without having its coach divided into compartments by a good and substantial wooden partition, or any partition with a door therein, each compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

(Signed)

STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

Witnesses:

Dr. J. P. Riffe, Erlanger, Ky.
S. W. Adams, Erlanger, Ky.
Stephens L. Blakely, Covington, Ky.
Jno. B. Dillon, Covington, Ky.
A. A. Shearer, Erlanger, Ky.

Thereupon on the same day a Summons issued and was afterwards returned as follows:

Summons.

THE COMMONWEALTH OF KENTUCKY:

To any sheriff, coroner, jailer, constable, marshal, or policeman in this State:

You are commanded to summon the south Covington and Cincinnati Street Railway Company, a corporation to appear at the

Kenton Circuit Court, at Covington, on the 9th, day of March, 1916,
to answer an indictment for a misdemeanor pending against
7 it in said Court.

Giving under my hand as Clerk of said Court, this 19th day of
February, 1916.

H. G. KLOSTERMANN, *Clerk*,
By CHAS. F. DROEGE, *D. C.*

Return.

Executed the within Summons Fed. 21st, 1916, on The South
Covington and Cincinnati Street Railway Company, by delivering
a true copy -hereof to W. W. Freeman, President of the South Cov-
ington and Cincinnati Street Railway Company.

JOHN ALLISON,
Sheriff, Kenton Co.,
By THOS. KENNEY, *D. S.*

Order Filing Motion for Subpœna Duces Tecum, and Order.

At a sitting of said Court on November 18th, 1916:

"The Commonwealth of Kentucky filed in open Court two motions
for a subpoena duces tecum for Polk Laffoon, and W. P. Horton, and
it is ordered that Polk Laffoon and W. P. Horton, are ordered to
appear on Nov. 21, 1916, at 9:30 P. M., and bring with them all
records books and papers in their possession under their control, and
in their custody, showing any agreement, understanding or contract
between the South Covington and Cincinnati Street Railway Com-
pany and the Covington and Cincinnati and Erlanger St. Rwy.
Company, as to the method of operation of street cars by said Com-
pany, and also records showing the number of cars operated over
what is known as the Ft. Mitchell line in Com'lth of Kentucky, dur-
ing month- of February and March, 1915."

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Order Filing Motion for Trial.

At a sitting of said Court on March 14, 1916:

"The Commonwealth filed in the Clerk's office a motion for trial."
Said Motion is as follows:

Motion.

"The plaintiff moves for trial in the above styled cause."

STEPHENS L. BLAKELY,

Attorney for Mover.

L. F. BROWN, *Contra.*

Order Setting Case for Trial April 27, 1916.

At a sitting of said Court on April 19, 1916:
"This case is set for trial on April 27, 1916."

Order Resetting Case for Trial May 2, 1916.

At a sitting of said Court on April 24, 1916:
"This case is reset for trial on May 2, 1916."

Order for Sbpa. Duces Tecum.

At a sitting of said Court on April 27, 1916:
"On motion of the Com'lth Attorney, a subpoena duces tecum will issue for Polk Laffoon, to appear in the Kenton Circuit Court, upon the trial of this case on the 2nd day of May, 1916, and bring with him and produce in Court the records of the defendant Company, containing the names of the directors and officers of the South Covington and Cincinnati Street Railway Company, and of the Cincinnati, Covington and Erlanger Ry. Co. in the years 1898 and 1899 and in the years 1915 and 1916, also the contract or agreement between the two Companies under and by reason of which and by the terms of which the defendant Company operates its cars over the tracks of the Cincinnati, Covington and Erlanger Railway Company; and the records of the two Companies, showing the names of the directors and officers of the two Companies, at the time said agreement or contract was executed."

Order Entering Demurrer to Indictment, Arguments Heard, and Cause Submitted.

At a sitting of said Court on May 2, 1917:
"The defendant entered a demurrer to the indictment herein. The Court hears arguments, and case is submitted."

Order Filing Opinion and Demurrer to Indictment Overruled.

At a sitting of said Court on June 21, 1916:
"The Court files an opinion, The demurrer to the Indictment is overruled."

Order Filing Motion for Trial.

At a sitting of said Court on June 23, 1916:
"Plaintiff filed in the clerk's office a Motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."

STEPHENS L. BLAKELY,
Atty. for Mover.

LEWIS F. BROWN, *Contra.*

Order Filing Motion for Trial.

At a sitting of said Court on August 2, 1916:

"Plaintiff filed in the Clerk's office a Motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial in the above cause."

10 STEPHENS L. BLAKELY,
Attorney for Mover.

LEWIS F. BROWN, *Contra.*

Order Setting Case for Trial on Nov. 21/16.

At a sitting of said Court on October 2, 1916:

"This case is set for trial on November 21, 1916."

Order for Subpœna Duces Tecum.

At a sitting of said Court on November 18, 1916:

"The Commonwealth of Kentucky moved for a Subpoena duces tecum for Polk Laffoon and W. P. Horton. Said Motion is sustained, and it is ordered that Polk Laffoon and W. P. Horton, are ordered to appear on Nov. 21st, 1916, at 9:30 A. M., and bring with them all records, books and papers in their possession under their control, and in their custody showing any agreement, understanding or contract between the South Covington and Cincinnati Street Railway Co., and The Covington, Cincinnati and Erlanger Rwy. Co., as to the method of operation of street cars by said Company, and also records showing the number of cars operated over what is known as the Fort Mitchell line in Com'lth of Kentucky during month-of February and March, 1915."

Order Setting Cause for Trial on April 10/17.

At a sitting of said Court on March 19, 1917:

"This case is set for trial on April 10, 1917."

Order Contg. Case to April 12, 1917.

At a sitting of said Court on April 10, 1917:

"This case is continued to April 12, 1917."

- 11 *Order Calling for Trial, Waiving Jury, Law and Facts Submitted, Plea of Not Guilty Entered, and Continued to April 17/17.*

At a sitting of said Court on April 12, 1917:

"This case being called for trial, and parties announcing themselves as ready, by agreement of parties the right of trial by Jury is waived and the law and facts submitted to the Court. Reading of the Indictment is waived. Defendant entered a plea of not guilty, and cause is continued to April 17, 1917."

Court Hears Argument, and Order Filing Motion to Dismiss Indct., Comlth. Objects.

At a sitting of said Court on May 2, 1917:

"The Court hears oral argument. Defendant offered in open Court motion to dismiss indictment, to which Commonwealth objects. Said objection is overruled, and said motion is filed to which the Commonwealth excepts."

Said motion is as follows:

Motion.

"Now comes the defendant, at the close of all the evidence, and moves the Court for the dismissal of the indictment and the acquittal of the defendant on the following grounds:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article

1, Section VIII of the Constitution of the United States.

2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

3. That defendant was not at the time covered by the indictment, running or otherwise operating a railroad within the meaning of the Statute of Kentucky upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence."

(Signed)

ERNST, CASSATT & COTTLE,
Attys. for Defendant.

Order Submitting Case.

At a sitting of said Court on the same day, May 2, 1917:

"This case is submitted."

Order Filing Brief.

At a sitting of said Court on May 17, 1917:

"Defendant filed in the clerk's office a brief."

Order Filing Opinion, and Judgment.

At a sitting of said Court on June 13, 1917:

"The Court filed an opinion and order, the law and facts being submitted to the Court, it is adjudged that the defendant is guilty as charged in the indictment and said defendant will pay to the Commonwealth of Kentucky a fine of \$500.00, to which the defendant excepts."

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Order Filing Motion for New Trial.

At a sitting of said Court on June 15, 1917:

"Defendant filed in open Court motion for new trial."

Said Motion is as follows:

Motion.

"Now comes the defendant and moves that the finding and judgment of the court be set aside and for a new trial, on the following grounds:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The Court erred in overruling the motion of the defendant at the close of all the evidence for the dismissal of the indictment, and the acquittal of the defendant on the following grounds, and each of them:
 1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.
 2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

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3. That defendant was not at the time covered by the indictment, running or otherwise operating a railroad within

the meaning of the Statute of Kentucky upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence.

Wherefore, defendant prays that the verdict and judgment of the court be set aside and a new trial granted."

(Signed)

ERNST, CASSATT & COTTLE,

Attorneys for Defendant.

Order Overruling Motion for New Trial and Order Filing Motion for Arrest of Judgment.

At a sitting of said Court on June 25, 1917.

"Defendant's motion for new trial is overruled to which the defendant excepts. Defendant filed in open Court motion for Arrest of Judgment."

Said Motion is as follows:

Motion.

"Defendant moves the Court to arrest the judgment in this cause because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court."

ERNST, CASSATT & COTTLE,

Attorneys for Defendant.

15 *Order Overruling Motion for Arrest of Judgment, and Appeal to Court of Appeals.*

At a sitting of said Court on the same day, June 25, 1917:

"Defendant's motion for arrest of judgment is overruled, to which the Defendant excepts and prays an appeal to the Court of Appeals, which is granted."

On June 27th., 1917, the Defendant executed the following Superseas Bond:

Superseas Bond.

COMMONWEALTH OF KENTUCKY, Plaintiff,

VS.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, Defendant.

We undertake that the defendant, The South Covington and Cincinnati Street Railway Company, will pay to the Commonwealth of Kentucky, all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said Court,

rendered June 13th., 1917, for Five Hundred Dollars (\$500.00), also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the Court passing upon said appeal may render or order to be rendered by the inferior Court not exceeding in amount or value the said judgment appealed from; also that said defendant will satisfy all rents, hire or damage accruing during the pendency of said appeal, upon or to any property of which said Commonwealth of Kentucky, may be kept out of possession by reason of said appeal.

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Witness our hands, this June 27th., 1917.

THE SOUTH COVINGTON & CINCINNATI
STREET RAILWAY COMPANY,

By ERNST, CASSATT & COTTLE, *Attorneys*.
AMERICAN SURETY COMPANY OF NEW
YORK,

By U. J. HOWARD, *Resident Vice-President*.

Attest:

[SEAL.] ED. E. WALKER,
Resident Asst. Secretary.

Approved:

H. G. KLOSTERMANN, *Clerk*,
By R. T. VON HOENE, *D. C.*

*Order Tendering Bill of Evidence and Exceptions and Order Filing
Schedule.*

At a sitting of said Court on July 24th., 1917:

"Defendant tendered in open Court Bill of Evidence and Exceptions and the Court takes time on the motion to sign the same. Defendant filed in the Clerk's office a Schedule."

Said Schedule is as follows:

Schedule.

"The Clerk will copy the entire record herein for an appeal to the Court of Appeals."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

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Order Signing Bill of Evidence and Exceptions.

At a sitting of said Court on July 27th., 1917:

"The Court signed in open Court the Bill of Evidence and Exceptions heretofore tendered herein, and the same is made a part of the record without being spread upon the order book."

Certificate.

Kenton Circuit Court.

I, H. G. Klostermann, Clerk of said Court, certify that this and the preceding fourteen pages contain a true and complete transcript of the record in the cause styled in the caption.

Given under my hand as Clerk of said Court, this 2nd. day of August, 1917.

H. G. KLOSTERMANN,
Clerk of Kenton Circuit Court.

18 Kenton Circuit Court, Criminal, Common Law, & Equity
Division.

No. 3094.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COM-
PANY, ETC., Defendant.

No 3114.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY,
ETC., Defendant.

Bill of Evidence and Exceptions.

The foregoing causes were by agreement heard together and came on for hearing on Thursday, April 12th, 1917, at the Court House, Covington, before the Hon. F. M. Tracy, Judge.

Appearances:

Hon. Stephens L. Blakely, for the Commonwealth.
Messrs. Ernst, Cassatt & Cottle, for the Defendants.

By agreement of counsel for both the Commonwealth and Defendants, the right of trial by jury is waived, and the law and facts submitted to the Court.

10 The reading of the indictment is waived, formal arraignment waived, and defendants enter a plea of not guilty.

The Commonwealth to maintain the issue upon its part, introduced as a witness, Mr. POLK LAFFOON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely.

Q. Mr. Laffoon, you are Secretary and Treasurer of the South Covington & Cincinnati Street Railway Company?

A. Yes, sir.

Q. The South Covington & Cincinnati Street Railway Company was organized under an act of the General Assembly of the Commonwealth of Kentucky, approved January 25, 1876, and amendments thereto dated March 13, 1878, and April 5, 1878, is that true?

A. That is true.

Copies of the Charter of South Covington and Cincinnati Street Railway Company and amendments thereto, referred to, are filed as a part of the testimony of the witness, and marked Exhibits A, B, & C.

EXHIBIT "A."

Charter of South Covington and Cincinnati Street Railway Company, January 25, 1876.

"An Act to Incorporate the South Covington and Cincinnati Street Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That E. F. Abbott, B. R. Morton, W. O. Ford and S. C. Hermes, or those of them who shall act, their associates
20 successors or assigns, be, and are hereby, created a body corporate and politic, with perpetual succession under the name and style of the South Covington and Cincinnati Street Railway Company and in such name have full power to contract, and be contracted with, sue and be sued, construct, operate and manage street railways in the city of Covington and vicinity.

Section Two. Said company shall have a capital stock not to exceed two hundred thousand dollars, divided into shares of fifty dollars each.

Section Three. The business of said corporation shall be the construction, operation and management of street railways in the city of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by

agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel, and plank roads, and it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport, or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof.

Section Four. Authority is hereby given to the company to cross the tracks of any other company; also to connect with and use the track of any other railway company in the city of Covington and vicinity, on equitable terms—that is, to pay such company a fair compensation for the use of such track. In the event a mutual agreement can not be effected with such other company for the use of such part of its track as desired, then such use may be condemned by proceedings under a writ of ad quod damnum, as provided in chapter 110, entitled "Turnpike, Gravel and Plank road" in the General Statutes.

Section Five. The Board of Directors shall consist of not less than three nor more than five, as shall be determined from time to time by the By-Laws that may be ordained by the Board of Directors, also which shall prescribe the time, manner and place of election. Each share of stock shall entitle the holder to one vote, either by himself or proxy, in writing, and the person having the highest number of votes shall be declared elected.

Section Six. The corporators in the first section mentioned their associates, successors or assigns, shall organize said company, and shall constitute the first board of Directors. The Board shall elect one of its members President, and such other officers as may be deemed advisable; and may fill all vacancies occurring in the board; and may appoint such agents and employees as may be desired, and prescribe their duties and fix their compensation; and may make all necessary by-laws and rules for the management of the company; and may purchase and hold such real and personal estate, routes, railway tracks, bonds, notes or obligations as may be deemed requisite for its use, and sell, convey and exchange the same at pleasure; and may dispose of stock from time to time, and reissue such as may be acquired in the course of its business, whether taken for liens, debts or otherwise; they may borrow money on the credit of the company at a rate of interest not exceeding ten per cent per annum, and may execute the notes or bonds of the company, and sell or dispose of the same, when deemed advisable, for the use and benefit of the company; and to secure the payment thereof, or of any indebtedness of the company, may mortgage or pledge the whole or any part of the property, income and franchise of the company.

Section Seven. The company shall have the right to charge reasonable rates of fares for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment such passenger may be excluded therefrom, provided the company shall have the rate in print posted up in the cars.

Section Eight. The President shall be the chief officer of the company, and shall perform such duties, and possess such powers, and receive such salary or compensation as the board may from time to time prescribe.

23 Section Nine. This act shall be in force from its passage.
Approved January 25th, 1876.

"EXHIBIT B."

Amendment to Same, March 13, 1878.

An Act to amend the South Covington and Cincinnati Street Railway Charter.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That the said company be and is hereby, authorized and empowered to construct, extend and operated its line of railway along Fourth street, from Scott street to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and this street railway company; also to construct and operate its lines of street railway along such streets in the City of Newport as it may designate, and as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully empowered to make such contracts and agreements with this street car company.

24 Section Two. Said company may construct and operate any branch or branches to its main line which may be deemed advantageous; and may change lines, or consolidate them, or change locations of branches, remove tracks to new locations, the right of way being first obtained therefor.

Section Three. In the event of a failure to make an agreement with said bridge companies, or either, for the right of transit across the same with said railway of this company, or to effect an agreement with the proper authorities of either of said cities for the right of way, or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, street or railway track, by proceedings by writ of ad quod damnum, as provided in chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

Section Four. This act shall be in force and take effect upon and after its passage.

Approved March 13th, 1878.

"EXHIBIT C."

Amendment to Same, April 5, 1878.

An Act to Amend the Charter of the South Covington and Cincinnati Street Railway Company.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

25 Section One. That the said company be, and is hereby, authorized and empowered to construct, extend and operate its line of railway along Fourth street, from Scott street in the city of Covington to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and said street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully authorized to make such contracts and arrangements with said street railway company.

Section Two. Said company may construct and operate any branch or branches to its main line within the city of Newport which may be deemed advantageous, and may change such lines, or consolidate them, or change the location of any of its branches, or remove its tracks to new locations, the right of way therefor having been first obtained from said city. Said city of Newport shall prescribe the terms and conditions upon which said railway company may operate and control said line, branches, changed lines and consolidations, constructed in said city of Newport, under the authority of this amendment.

26 Section Three. In the event of a failure to make an agreement with said bridge companies, or either of them for the right of way across the same with said railway company or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, or railway track, by proceeding by writ of *ad quod damnum*, as provided in chapter 110 of the General Statutes, entitled "Turn pike, Gravel and Plank Roads."

Section Four. The cars used on said lines — railway shall not be operated or propelled by steam power; the tracks thereof shall conform to the grades of the streets on which they are respectively located, and during the construction or repair, or reconstruction of such streets shall be taken up if necessary and replaced at the cost of said railway company; and said company shall have no claim for damages, by reason thereof, against said city of Newport, nor for any delay or hinderance thereby occasioned to the running of the cars of said railway company.

Section Five. This act shall be in force from its passage.
Approved April 5th, 1878.

Q. Is it not a fact that since December 1876, the South Covington and Cincinnati Street Railway Company has been engaged in the operation of a street railway system?

A. Yes, sir.

Q. And it has operated in Covington and the surrounding municipalities in Kenton County and in the vicinity of said municipalities.

A. Yes, sir.

27 Q. Also in Newport and the surrounding Municipalities in Campbell County?

A. Yes, sir.

Q. The South Covington and Cincinnati Street Railway Company by virtue of some arrangement with the Cincinnati, Newport and Covington Street Railway Company, of Ohio, transports passengers in its cars between these different cities of Kentucky in Kenton and Campbell Counties of said state of Kentucky and Cincinnati, Ohio?

A. Yes, sir.

Q. Is it a fact that on or about the 18th. of September, 1899, the Cincinnati, Covington and Erlanger Railway Company was incorporated?

A. Yes, sir.

Q. Have you with you a copy of the articles of incorporation of this railway?

A. Yes, sir.

Q. Will you file them?

A. Yes, sir.

Said copy of the articles of the incorporation of the Cincinnati, Covington and Erlanger Railway Company, are filed and marked Exhibit "D."

Know all men by these presents, that the undersigned have and do hereby associate themselves together to form an incorporated company, under the general statutes of Kentucky, for the purpose of constructing a line of railway, as hereinafter stated, and do subscribe for the amount of the capital stock of said company, set opposite to our respective names.

28 First. The name of the said corporation shall be the Cincinnati, Covington and Erlanger Railway Company.

Second. The principal office of the said company shall be in Covington, Kenton County, Kentucky.

That the first board of directors of said company shall be James C. Ernst, Henry Feltman, John A. Simpson, George W. Hamilton and C. B. Simrall, each of whom own at least three shares of capital stock of said company.

Third. The business of the said company shall be the construction, maintenance and operation of a line of railway, not exceeding ten (10) miles long, with a single or double track, and with all the usual and convenient appendages and appurtenances thereunto belonging.

including the right to erect maintain and operate electric poles and wires over and along said railway, and with the privilege of operating a line of telegraph or telephone on and over the line of said railway. Said railway is to be constructed and operated, from the city of Covington, Kenton County, Ky., to the town of Erlanger, in Kenton County, Ky., and to such further point beyond said town of Erlanger as may be hereafter determined upon, and over, along, and upon such bridges, streets, roads, highways, and such private property, as said company may, by due process of law, acquire the right to lay its tracks and other appliances and appendages upon.

Fourth. Said railway shall be operated by electricity or other improved methods of rapid transit.

Fifth. The capital stock of said company shall be two hundred and fifty thousand (\$250,000) dollars, divided into shares of fifty (\$50.00) dollars each.

Sixth. The maximum charge, for the transportation of passengers, on and over said line of railway, shall not exceed ten (ten) cents per passenger between Erlanger, Ky., and Cincinnati, Ohio, and five (5) cents per passenger between Erlanger, Ky., and Covington, Ky.

Seventh. Said corporation shall begin from and after the filing of these articles of incorporation with the Secretary of State, in the Commonwealth of Kentucky, and shall continue in force for ninety-nine (99) years, unless sooner dissolved in the manner prescribed by law.

Eighth. The affairs of said corporation shall be managed and conducted by a board of five directors, who shall be elected at such time and place as provided in the by-laws, and said board of directors shall choose such officers of said company as shall be provided for by the by-laws of said company.

Ninth. The highest amount of indebtedness or liability which said company may, at any time, incur, shall not exceed two hundred and fifty thousand (\$250,000) dollars.

Tenth. The private property of the stockholders of said company shall be exempt from all liability for any of the debts or obligations of said company.

In testimony whereof, we have hereunto set our hands on this 18th. day of September, 1899.

James C. Ernst, Covington, Ky.	20 shares
Henry Feltman, Kenton Co., Ky.	20 shares
T. S. Hamilton, Covington, Ky.	1 share
John A. Simpson, Covington, Ky.	5 shares
G. W. Hamilton, Covington, Ky.	3 shares
C. B. Simrall, Covington, Ky.	3 shares
C. P. Garvey, Cleveland, Ohio	1 share

STATE OF OHIO,
Hamilton County, ss:

I, Alfred Mack, Notary Public in and for the county and state aforesaid, do hereby certify that the foregoing instrument of writing,

being the articles of incorporation of the Cincinnati Covington and Erlanger Railway Company, was this day produced to me, by the parties, in this county and state, and then and there acknowledged by James C. Ernst, Henry Feltman, T. S. Hamilton, John A. Simpson, G. W. Hamilton and C. B. Simrall, incorporators, who are known to me to be such, to be their voluntary act and deed.

Given under my hand and seal of office, this 18th. day of September, 1899.

[SEAL.]

ALFRED MACK,
Notary Public in and for
Hamilton County, Ohio

My commission expires July 30, 1901.

(Stamp.)

STATE OF OHIO,
Cuyahoga County, act:

I, John D. Ertel, Notary Public in and for the county and state aforesaid, do hereby certify that the foregoing instrument in writing, being the articles of incorporation of the Cincinnati Covington and Erlanger Railway Company, was this day produced to me by C. P. Garvey, who is known to me to be such, in this county and state, and then and there acknowledged by the said C. P. Garvey, incorporator, to be his voluntary act and deed.

Given under my hand and seal of office, this 19th. day of September, 1899.

[SEAL.]

JOHN D. ERTEL,
Notary Public.

My commission expires 1901.

(Stamp.)

STATE OF KENTUCKY,
Kenton County, act:

I, Alex Davezac, Clerk of the County Court, for the county and state aforesaid, do hereby certify that the foregoing articles of incorporation of the Cincinnati, Covington and Erlanger Railway Company were this day presented to me in my office, certified as above and left for record. Whereupon the same and the foregoing certificates and this certificate duly stamped as required by an act of Congress have been duly recorded in my office.

Given under my hand, this 28th. day of September, in the year 1899.

ALEX DAVEZAC, Clerk,
By ALB. DAVEZAC,
Deputy Clerk.

(U. S. 10¢ stamp.)

STATE OF KENTUCKY,
Kenton County, *act*:

I, Alex Davezac, Clerk of the County Court, within and for the County aforesaid, the same being a Court of Record, having a seal and having jurisdiction of the probate of wills and the appointment and qualification of executors, administrators, guardians and other fiduciaries, do hereby certify that the foregoing and hereto attached writing contain- a full and complete copy of the amended articles of incorporation of the Cincinnati, Covington and Erlanger Railway Company as fully as the same appears from the records on file in my office.

In testimony whereof, I have hereunto subscribed my name at my office in Covington, Kentucky, this 28th. day of September, A. D., 1899.

ALEX DAVEZAC, *Clerk*.

(I. R. Stamp, 10¢.)

31 COMMONWEALTH OF KENTUCKY:

Office of Secretary of State.

I, Chas. Finley, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereunto sign my name, and cause my official seal to be affixed. Done at Frankfort, this 16th day of December, A. D. 1899.

CHAS. FINLEY,

Secretary of State,

By E. E. WOOD,

Assistant Secretary of State.

Q. The town of Erlanger referred to in these articles of incorporation was and is located in the County of Kenton, State of Kentucky, about 6.21 miles from the nearest corporation line of the city of Covington, is it not?

A. Yes, sir.

Q. And about eight miles from the remotest point in the city of Covington, and about 8.70 miles from Fountain Square, in Cincinnati?

A. Yes, sir.

Q. Is it true that shortly after the articles of incorporation were filed, that is of the Cincinnati, Covington and Erlanger Railway

Company, the construction of the road began, that is the construction of what is now known as the Ft. Mitchell line, was begun?

A. Yes, sir.

Q. This line was completed out as far as the Highland and St. Mary's Cemeteries, a distance of about 3.75 miles from the nearest corporation line of Covington, that is true isn't it?

32 A. Yes, sir.

Q. And opened for travel in December, 1902?

A. Yes, sir.

Q. Is it true that the Covington end of the line authorized under these articles of incorporation was at the western corporation line of the city of Covington?

A. The Covington end of the line begins 600 feet within the corporate limits of the city of Covington.

Q. At Montague street?

A. Yes, sir.

Q. At that point the road connects with the regular tracks of the South Covington and Cincinnati Street Railway Company?

A. Yes, sir.

Q. Later, in the year 1912 an additional mile was constructed from the Cemeteries aforesaid to a point on the Lexington Pike near the Buttermilk Pike?

A. Yes, sir.

Q. The town of Ft. Mitchell is on the line of this railway, is it not?

A. Yes, sir.

Q. About three miles west of Covington?

A. Yes, sir.

Q. At the time of the incorporation of the Cincinnati, Covington and Erlanger Railway Company, did that company own any cars of its own?

A. No, sir.

33 Q. Did it have in its possession, either as owner or any other way, any cars of its own?

A. No, sir.

Q. This line of railway which we have been talking about, which was constructed for the purpose of operating cars by means of electric power, did not have then, or at any time, any power house, did it?

A. No, sir.

Q. Did it have either as owner, or lessee, or any other way, any means of furnishing electric power?

A. No, sir.

Q. The South Covington and Cincinnati Street Railway Company, at that time did have electric cars? Is that right?

A. Yes, sir.

Q. And a power house?

A. Yes, sir.

Q. And it is true that the only cars ever operated over Cincinnati, Covington and Erlanger Railway Company tracks were cars of the

South Covington and Cincinnati Street Railway Company, is that true?

A. Yes, sir, it is true too that the Cincinnati, Covington and Erlanger Railway Company, never had any tracks other than those built by the South Covington and Cincinnati Street Railway Company.

Q. Do you mean these tracks we have talked about, have been constructed by The South Covington and Cincinnati Street Railway Company?

A. Yes, sir.

34 Q. Is it not a fact that they were constructed under the authority and by virtue of the charter of the Cincinnati, Covington and Erlanger Railway Company?

A. Yes, sir.

Q. At the time of the organization of the Cincinnati, Covington and Erlanger Railway Company, is it not a fact that the officers of that company, and the officers of the South Covington and Cincinnati Street Railway Company, were practically the same?

(Objected to by defendant.)

Q. Have you a list with you, showing the names of the directors and officers of the two said companies, for the year 1899, and thereafter and up to and including the year 1917?

A. Yes, sir.

Q. Will you find that statement?

A. Yes, sir.

Defendant files statement of the officers and directors of the Cincinnati, Covington and Erlanger Railway Company. Same marked Exhibit "E." Defendant also files statement of the officers of the South Covington and Cincinnati Street Railway Company. Same marked Exhibit "F."

35

EXHIBIT "E."

The Cincinnati, Covington & Erlanger Railway Co.

Articles of Incorporation filed September 20th, 1899.

Year.	Directors.	Officers.
Sept. 18th, 1899.	James C. Ernst. Henry Feltman. John A. Simpson. Geo. W. Hamilton. C. B. Smrall.	
October 5th, 1899, Mr. Ernest and Mr. Feltman resigned as Directors.	John A. Simpson. Geo. W. Hamilton. C. B. Smrall. W. E. Hutton. J. R. Ledyard.	John A. Simpson, President. W. E. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.

EXHIBIT "E."—Continued.

Year.	Directors.	Officers.
1900.	John A. Simpson. Geo. W. Hamilton. C. B. Simrall. W. E. Hutton. J. R. Ledyard.	John A. Simpson, President. W. E. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1901.	John A. Simpson. Geo. W. Hamilton. C. B. Simrall. W. E. Hutton. J. R. Ledyard.	John A. Simpson, President. W. E. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1902.	James C. Ernst. James M. Hutton. Henry Burkhold. Jos. S. Trevor. Chas. M. Thurnauer.	J. C. Ernst, President. Henry Burkhold, Vice-Pres. G. M. Abbott, Secy.-Treas.
1903.	James C. Ernst. James M. Hutton. Henry Burkhold. Jos. S. Trevor. Chas. M. Thurnauer.	J. C. Ernst, President. Henry Burkhold, Vice-Pres. G. M. Abbott, Secy.-Treas.
1904.	James C. Ernst. James M. Hutton. W. S. Rowe. Jos. S. Trevor. Chas. M. Thurnauer.	J. C. Ernst, President. W. S. Rowe, Vice- " G. M. Abbott, Secy.-Treas.
1905.	James C. Ernst. James M. Hutton. W. S. Howe. Jos. S. Trevor. Chas. M. Thurnauer.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1906.	J. C. Ernst. J. M. Hutton. W. S. Rowe. J. S. Trevor. C. M. Thurnauer.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1907.	J. C. Ernst. J. M. Hutton. W. S. Rowe. J. S. Trevor. C. M. Thurnauer.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.

EXHIBIT "E."—Continued.

Year.	Directors.	Officers.	
1906.	J. C. Ernst. J. M. Hutton. N. S. Kelth. L. J. Hauck. 4/15/08. A. S. White.	J. C. Ernst, J. M. Hutton, G. M. Abbott, Polk Laffoon,	President. Vice-Pres. Secy.-Treas. Secy.-Treas.
1909.	J. C. Ernst. A. S. White. J. M. Hutton. F. B. Enslow. R. W. White. W. T. Hunter.	J. C. Ernst, J. M. Hutton, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1910.	J. C. Ernst. J. M. Hutton. A. S. White. F. B. Enslow. R. W. White. W. T. Hunter.	J. C. Ernst, J. M. Hutton, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1911.	J. C. Ernst. J. M. Hutton. A. S. White. F. B. Enslow. R. W. White. W. T. Hunter.	J. C. Ernst, J. M. Hutton, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1912.	J. C. Ernst. J. M. Mutton. A. S. White. F. B. Enslow. R. W. White. W. T. Hunter. N. G. Keenon. Geo. P. Toby.	J. C. Ernst, J. M. Hutton, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
8/14/1912. Resignations of A. S. White, R. W. White, N. G. Kenon.	J. C. Ernst. J. M. Hutton. W. T. Hunter. P. G. Gossler. Wm. S. Cox. Geo. P. Toby. F. B. Enslow.		

EXHIBIT "E."—Continued.

Year.	Directors.	Officers.	
1913.	J. C. Ernst. J. M. Hutton. F. B. Enslow. P. G. Gossler. Wm. S. Cox. Geo. P. Toby. W. Y. Cartwright.	J. C. Ernst, P. G. Gossler, Polk Laffoon,	President, Vice-Pres. Secy.-Treas.
1/2/1914. Resignations of Geo. P. Toby as Di- rector and P. G. Gossler as Vice- President.	J. C. Ernst. J. M. Hutton. F. B. Enslow. P. G. Gossler. Wm. S. Cox. W. Y. Cartwright. W. W. Freeman.	J. C. Ernst, W. W. Freeman, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
10/14/14. Resignation of J. C. Ernst as Di- rector and Presi- dent.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. F. B. Enslow. P. G. Gossler. Wm. S. Cox. J. M. Hutton.	W. W. Freeman, W. Y. Cartwright, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1915.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. J. M. Hutton. F. B. Enslow. P. G. Gossler. Wm. S. Cox.	W. W. Freeman, W. Y. Cartwright, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1916.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. J. M. Hutton. F. B. Enslow. P. G. Gossler. Wm. S. Cox.	W. W. Freeman, W. Y. Cartwright, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.
1917.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. J. M. Hutton. Chas. P. Taft. P. G. Gossler. Wm. S. Cox.	W. W. Freeman, W. Y. Cartwright, Polk Laffoon,	President. Vice-Pres. Secy.-Treas.

EXHIBIT "F."

The South Covington & Cincinnati St. Ry. Co.

Year.	Directors.	Officers.
1899.	James C. Ernst. Chas. B. Simrall. John A. Simpson. Henry Feltman. M. Winstel.	J. C. Ernst, President. J. A. Simpson, Vice-Pres. G. M. Abbott, Secy.-Treas.
1900.	James C. Ernst. Chas. B. Simrall. James M. Hutton. Henry Feltman. John A. Simpson.	J. C. Ernst, President. J. A. Simpson, Vice-Pres. G. M. Abbott, Secy.-Treas.
1901.	James C. Ernst. James M. Hutton. Joseph S. Trevor. C. M. Thurnauer. Henry Burkhold.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott.
1902.	J. C. Ernst. J. M. Hutton. C. M. Thurnauer. J. S. Trevor. Henry Burkhold.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Sec.-Treas.
1903.	James C. Ernst. James M. Hutton. Chas. M. Thurnauer. Henry Burkhold. Joseph S. Trevor.	J. C. Ernst, President. J. M. Hutton, Vice- " G. M. Abbott, Secy.-Treas.
1904.	James C. Ernst. J. M. Hutton. C. M. Thurnauer. Jos. S. Trevor. W. S. Rowe.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1905.	James C. Ernst. J. M. Hutton. W. S. Rowe. Jos. S. Trevor. C. M. Thurnauer.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.
1906.	J. C. Ernst. J. M. Hutton. W. S. Rowe. Jos. S. Trevor. C. M. Thurnauer.	J. C. Ernst, President. J. M. Hutton, Vice-Pres. G. M. Abbott, Secy.-Treas.

EXHIBIT "F."—Continued.

Year.	Directors.	Officers.	
1907.	J. C. Ernst. J. M. Hutton. W. S. Rowe. C. M. Thurnauer. Jos. S. Trevor.	J. C. Ernst, J. M. Hutton, G. M. Abbott,	President. Vice-Pres. Secy.-Treas.
1908.	J. C. Ernst. J. M. Hutton. N. S. Keith. A. S. White. L. J. Hauck.	J. C. Ernst, J. M. Hutton, G. M. Abbott, Polk Laffoon,	President. Vice-Pres. Sec.-Treas. Sec.-Treas.
1909.	J. C. Ernst. J. M. Hutton. N. S. Keith. A. S. White. L. J. Hauck.	J. C. Ernst, J. M. Hutton, Polk Laffoon,	President. Vice-Pres. Sec.-Treas.
1910.	J. C. Ernst. A. S. White. F. B. Enslow. N. G. Kenon. J. M. Hutton. R. W. White. W. T. Hunter.	J. C. Ernst, R. W. White, C. R. McKay, W. T. Hunter, Polk Laffoon, Polk Laffoon, Albert Silva,	President. Vice-President. Gen. Mgr. Treasurer. Asst. " Secretary. Asst. "
1911.	J. C. Ernst. A. S. White. J. M. Hutton. R. W. White. W. T. Hunter.	J. C. Ernst, R. W. White, C. R. McKay, W. T. Hunter, Polk Laffoon,	President. Vice-Pres. Gen. Mgr. Treas. A. Sec. Secy.-A. Treas.
1912.	J. C. Ernst. J. M. Hutton. A. S. White. F. B. Enslow. R. W. White. N. G. Kenon. W. T. Hunter.	J. C. Ernst, R. W. White, C. R. McKay, Polk Laffoon, W. T. Hunter,	President. Vice-Pres. Gen. Mgr. Secy.-A. Treas. Treas.-A. Secy.

42

Resignations of A. S. White, R. W. White, N. G. Kenon, Directors, R. W. White, Vice- Pres., W. T. Hunter, Director.	J. C. Ernst. J. M. Hutton. P. G. Gossler. Wm. S. Cox. F. B. Enslow.	J. C. Ernst, P. G. Gossler,	President. Vice-Pres.
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EXHIBIT "F."—Continued.

Year.	Directors.	Officers.
1913.	J. C. Ernst. F. B. Enslow. P. G. Gossler. Wm. S. Cox. W. Y. Cartwright.	J. C. Ernst, President. P. G. Gosler, Vice " C. R. McKay, Gen. Mgr. Polk Laffoon, Secy.-Treas.
1914.	J. C. Ernst. W. W. Freeman. P. G. Gosler. Wm. S. Cox. W. Y. Cartwright.	J. C. Ernst, President. W. W. Freeman, Vice " C. R. McKay, Gen. Mgr. Polk Laffoon, Secy.-Treas.
Oct. 14th Resignation of Mr. J. C. Ernst, as President and Director, Wm. S. Cox, resigned as Director.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. T. F. Wickham. P. G. Gossler.	W. W. Freeman, President. W. Y. Cartwright, Vice " Polk Laffoon, Sec.-Treas. T. F. Wickham, Comptroller.
1915. Miss A. S. Ball elected Asst. Treasurer.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. T. F. Wickham. P. G. Gossler.	W. W. Freeman, President. W. Y. Cartwright, Vice " Polk Laffoon, Sec.-Treas. T. F. Wickham, Comptroller. C. R. McKay, Gen. Mgr.
1916.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. T. F. Wickham. P. G. Gossler.	W. W. Freeman, President. W. Y. Cartwright, Vice " Polk Laffoon, Sec.-Treas. T. F. Wickham, Comptroller. A. S. Ball, Asst. Treas. A. Sherlock, Asst. Secy.
1917.	W. W. Freeman. W. Y. Cartwright. Polk Laffoon. T. F. Wickham. P. G. Gossler.	W. W. Freeman, President. W. Y. Cartwright, Vice " Polk Laffoon, Sec.-Treas. T. F. Wickham, Comptroller. A. Sherlock, Asst. Secy. A. S. Ball, Asst. Treas.

43 Q. Is it not a fact, Mr. Laffoon, that both of these companies occupy the same office and are under the same general management?

A. Yes, sir.

Q. And were at the time the line or track was constructed and continuously thereafter?

A. Yes, sir.

Q. It is true is it, that the Directors of The Cincinnati Covington and Erlanger Railway Company and the Directors of the South Covington and Cincinnati Street Railway Company, were each familiar with the affairs of the other company?

A. Yes, sir.

Q. And each know the method of operation by the other company of its line of railway?

A. Yes, sir.

Q. And that knowledge has continued until the present time?

A. Yes, sir.

Q. It is a fact, is it not that the original incorporators of the Cincinnati, Covington and Erlanger Railway Company, were parties interested as officers and directors and stock holders of the South Covington and Cincinnati Street Railway Company?

A. Yes, sir.

44 Q. Is it not a fact that the South Covington and Cincinnati Street Railway Company became the owner directly or indirectly of all the stock of the company, except qualifying shares of the Directors?

A. Yes, sir.

Q. And furnished all the money to build the road, is that right?

A. Yes, sir.

Q. And since said time all the stock of said road, except said qualifying shares, has been owned directly or indirectly by the South Covington and Cincinnati Street Railway Company, is that right?

A. Yes, sir, indirectly by the South Covington and Cincinnati Street Railway Company.

Q. What do you mean by the statement that it is owned indirectly by the South Covington and Cincinnati Street Railway Company?

A. Well, you said either directly or indirectly, the qualifying shares are indirectly owned by the South Covington and Cincinnati Street Railway Company.

Q. And all the rest are owned directly by the South Covington and Cincinnati Street Railway Company, is that right?

A. Yes, sir.

Q. Has the corporate existence of the Cincinnati, Covington and Erlanger Railway Company been maintained since it was chartered?

45 A. Yes, sir.

Q. Regular meetings held by the stockholders have been held, have they?

A. Yes, sir.

Q. And also by the Directors?

A. Yes, sir.

Q. And Directors and Officers have been regularly elected, have they?

A. Yes, sir.

Q. The South Covington and Cincinnati Street Railway Company operates over the line of railway of the Cincinnati, Covington and Erlanger Railway Company, and has always so operated since the opening of the road, over said line of railway, single truck cars

seating about thirty two persons; no trailers attached to these cars, and no provisions of any kind being made for the separation of white and colored passengers; no partition of any kind has ever been constructed in any car operated over this line, providing separate compartments for white and colored races; and there has never been any placard on said cars indicating that any part of said cars was set apart for either the white or colored race. Is that true?

A. Yes, sir, that is true.

It is agreed that on the First day of February, 1915, that the South Covington and Cincinnati Street Railway Company owned car No. 309 and that said car was a car of the description just stated a few minutes ago, that is a single truck car, seating about thirty two persons and that said car had no provision of any kind for the
46 separation of the white and colored races, and no placard indicating that any part of said car was set apart for either white or colored passengers; and that said car No. 309, did so operate on the First day of February between the terminus of the line of the Cincinnati, Covington and Erlanger Railway Company, and over the tracks of said company, from a point near Buttermilk Pike to Covington and on to Cincinnati in the State of Ohio, and back again, making the round trip.

A. Yes, sir, that is true.

Q. The said car passed through the cities of Ft. Mitchell and Covington, in Kentucky and Cincinnati, in Ohio?

A. Yes, sir.

Q. Did the South Covington and Cincinnati Street Railway Company and the Cincinnati, Covington and Erlanger Railway Company ever have an agreement, oral or written, by which the tracks of the Cincinnati, Covington and Erlanger Railway Company were to be used by the cars of the South Covington and Cincinnati Street Railway Company?

A. No, sir.

Q. Well, was there a tacit understanding between them?

A. I don't know, I am not in a position to say.

Q. Did the minute Books or records of the Cincinnati, Covington and Erlanger Railway Company or of the South Covington and Cincinnati Street Railway Company show anything to indicate an agreement of this sort between the two companies?

A. Nothing more than to show in a general way that their relations were very intimate, that is we recognized the South
47 Covington and Cincinnati Street Railway Company to be the owners of the Cincinnati, Covington and Erlanger Railway Company.

Q. There is no contract on file between the two companies of any kind or character, is there?

A. No, sir.

Q. Is there anything on the record books of the Cincinnati Covington and Erlanger Railway Company, to show that the South Covington and Cincinnati Street Railway Company does operate its

cars over the tracks of the Cincinnati, Covington and Erlanger Railway Company?

A. No, sir.

Cross-examination.

By Mr. Cassatt:

Q. All the cars which have been at any time operated over the tracks which have been referred to as the tracks of The Cincinnati, Covington and Erlanger Railway Company, have been owned and operated by the South Covington and Cincinnati Street Railway Company, have they not?

A. Yes, sir.

Q. And all these cars have been operated from the southerly terminus of the Cincinnati, Covington and Erlanger line to Fountain Square or some other point in Cincinnati, by a continuous trip?

A. Yes, sir.

Q. Is it not true that all these cars and the employees operating said cars were under the supervision of the Officers of the South Covington and Cincinnati Street Railway Company?

48 A. Yes, sir.

Q. Is it not also true that the cars have operated by continuous trip and in charge of the same crew in Kentucky and in Ohio?

A. Yes, sir.

Q. You spoke about the operation in Cincinnati by virtue of some arrangement with the Cincinnati, Newport and Covington Street Railway Company, do you know whether the Cincinnati, Newport and Covington Street Railway Company had a franchise in the city of Cincinnati on the streets on which the Erlanger or Ft. Mitchell cars, referred to in this case, were operated in 1915?

(Objected to by the Commonwealth; objection overruled; Commonwealth excepts.)

A. They have expired, we had a franchise, that is the Cincinnati, Newport and Covington Street Railway Company, had.

Q. The Cincinnati, Newport and Covington Street Railway Company owned all the stock of the South Covington and Cincinnati Street Railway Company, at that time, did it not?

(Objected to by the Commonwealth; objection overruled, the Commonwealth excepts.)

A. It did.

Q. The actual operation of these cars to which we have referred and all cars of the South Covington and Cincinnati Street Railway operated in Cincinnati, was carried on by the South Covington and Cincinnati Street Railway Company, was it not?

49 (Objected to by the Commonwealth; Objection overruled. Commonwealth excepts.)

A. It was.

Q. Since the organization of the South Covington and Cincinnati Street Railway Company, the greater part of the business of the system has been the carrying of passengers to and fro on the Cincinnati side in Ohio and in Covington and Newport in the State of Kentucky and in the vicinity thereof, has it not?

(Objected to by the Commonwealth; objection overruled; the Commonwealth excepts.)

A. Yes, sir.

Defendant offers in evidence, a map of the system of the South Covington and Cincinnati Street Railway Company.

Q. I will ask you to state whether this plat is substantially correct, showing the lines operated by the South Covington and Cincinnati Street Railway Company at the time of the indictment in this case?

A. Yes, sir, it is.

Q. Does it show what is known as the Erlanger line?

A. Yes, sir.

Q. That is on the left hand side of the map, is it not?

A. Yes, sir.

Said map, showing the lines operated by the South Covington and Cincinnati Street Railway Company, is filed in evidence and marked exhibit "G," and attached hereto last page.

50 Q. What at the time of the indictment was the rate of fare charged on the South Covington and Cincinnati Street Railway lines?

(Objected to by the Commonwealth; objection overruled; Commonwealth excepts.)

A. Five (5) cents.

Q. Was that true on all parts of its lines?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir, on all parts of its lines.

Q. What was the arrangement with reference to transfers?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. The Company gives universal transfers.

Q. What do you mean by universal transfers?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. They gave a transfer to any other road or line.

Q. Without the payment of any additional fare?

A. Yes, sir.

Q. Suppose passengers traveled from Cincinnati, during the period

of time in question, to the end of the Erlanger line, what was the rate of fare?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Five (5) cents.

Q. Suppose a passenger travels a distance of two blocks on that line, what was the rate of fare during the period of time in question?

51 (Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Five (5) cents.

Q. What was the rate of fare charged, say from Cincinnati, to Ft. Thomas, Military Post?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Five (5) cents.

Q. That is true, generally speaking, is it not, of all the lines and all parts of the lines of the South Covington and Cincinnati Street Railway Company, for any continuous trip?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. During the period in question, did the company give a transfer to passengers desiring to travel from the end of the Ft. Mitchell line, to the end of the Ft. Thomas line?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. And also to passengers going in any other direction, did they not?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir, and to make the trip from Ft. Mitchell to Ft. Thomas, they give two transfers.

Q. But all that would be for one fare, would it not?

(Objected to by Commonwealth; objection overruled.
52 Commonwealth excepts.)

A. Yes, sir.

Q. Is the town of Erlanger located on any Railroad?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. On what railroad is it located?

A. The Cincinnati Southern.

Q. Do you know about how far it is by rail from the city of Cincinnati, say from the bridge in Cincinnati, to Erlanger?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Approximately eight (8) miles.

Q. At the time that the Erlanger or Ft. Mitchell line was built, were there any municipalities on the line anywhere?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. You mean between Covington and St. Mary's Cemetery?

Q. Yes, sir.

A. No, sir, there was not.

Q. At first the line was built to St. Mary's Cemetery, is that right?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. Was there any other Cemetery on the line?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

33

A. Yes, sir, Highland Cemetery.

Q. Where is that Cemetery with reference to St. Mary's Cemetery?

A. It joins St. Mary's Cemetery.

Q. Do you know whether these Cemeteries were laid out and used by the people of Covington?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir, they were.

Q. To what extent, relatively?

(Objected to by the Commonwealth; objection overruled. Commonwealth excepts.)

A. Almost exclusively.

Q. The purpose of completing the line to these Cemeteries originally, was to afford means of access to these Cemeteries, was it not?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. Are either of these Cemeteries for the use of Colored people, or are they solely used by white people?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Used by white people, only.

Q. When, with reference to the time of the building of the road to the Cemeteries, was the town of Ft. Mitchell begun, and how did it come to be built there? If you know?

54 (Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. I think that the Ft. Mitchell Country Club was incorporated in 1900 or 1901, and with the building of the Ft. Mitchell Country Club, what was to be the town of Ft. Mitchell, came into being and then developed since that time.

Q. Is it not true that the Country Club or Golf Links were actually constructed and laid out, after the building of the Erlanger line?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. Then the town grew up and was ultimately incorporated?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir.

Q. It is true, is it not, that that municipality, is purely suburban to Cincinnati?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. Has it any places of amusement or business, any Drug store or grocery or anything of that kind?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. No, sir.

Q. You have lived there and you know, don't you?

A. Yes, sir.

55 Q. And it had not any such place at the time the indictment herein was returned, did it?

A. The only place of amusement was the Golf Links.

Q. Do you know the population of Ft. Mitchell, in February, 1915?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. I would say, between two hundred and fifty (250), and three hundred (300) people.

Q. Is the town of Ft. Mitchell, between the cemeteries and the city of Covington, or beyond?

(Objected to by Commonwealth; objection sustained. Commonwealth excepts.)

A. Between.

Q. It is within the original line built over the Erlanger right of way, is it not?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

W. When was an extension made from the cemeteries to any point beyond?

A. In 1912.

Q. To what point was it made?

A. To a point near the intersection of the Buttermilk and Lexington pikes.

Q. Is there any town there?

A. No, sir.

Q. Does the same rate of fare apply after the extension of the route as to the original route?

A. Yes, sir.

56 Q. Your testimony relates to the condition of affairs in February, 1915, after the extension had been made?

A. Yes, sir.

Q. You testified about a car, No. 309, operating on this route between these points on the First day of February, 1915, please state whether that car operated by continuous run from the southerly end of the Erlanger line, to the terminus of the South Covington and Cincinnati Street Railway Company, in Cincinnati?

(Objected to by Commonwealth; Objection overruled. Commonwealth excepts.)

A. It did.

Q. For one continuous fare?

A. Yes, sir.

Q. And under the management of the same crew?

A. Yes, sir.

Q. Has the Cincinnati, Covington and Erlanger Railway Company, during its life time or had it in 1915, any separate receipts?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. No, sir.

Q. Had it any separate expenditures?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. No, sir.

Q. Is it not a fact that this line was operated as a part of the South Covington and Cincinnati Street Railway Company system?

57 (Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir, it was, The Cincinnati, Covington and Erlanger Railway Company, never took in a nickel nor disbursed a nickel.

Q. Is it not true that all the regulations and customs with reference to the operation of the cars and the fares and transfers over the Erlanger line, applied in the same way and to the same extent that they applied to all other lines of the South Covington and Cincinnati Street Railway Company, in Kenton and Campbell counties in Kentucky, and in Cincinnati, Ohio?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Yes, sir.

Q. How are the mileage of the Erlanger route, and the receipts and disbursements thereon, returned to the Auditor of Public Accounts, by what company?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. By the South Covington and Cincinnati Street Railway Company?

Q. As a part of its return?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir.

Q. By whom is the assessment for taxation made?

A. By the State Board of Valuation and Assessment.

Q. How is the tangible property, such tangible property as the right of way and the rails, by whom is that assessed?

58 A. By the local authorities.

Q. Against what company?

(Objected to by Commonwealth; objection overruled. Commonwealth excepts.)

A. Against, I think, the Cincinnati, Covington and Erlanger Railway Company, proper. That same tangible property is certified to the Auditor of Public Accounts as a part of the South Covington and Cincinnati Street Railway system, and we are given the benefit of that deduction. — taxes are appraised in the name of the South Covington and Cincinnati Street Railway Company.

Q. That is to the County of Kenton?

A. Yes, sir, and the taxes are paid by the South Covington and Cincinnati Street Railway Company.

Q. In the case of Railroads and Interurban railroads of the state, state if you know whether there is any different method of return of assessments, what does the Railroad Commission have to do with that?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Tangible property of all railroads and Interurban roads are assessed by the Railroad Commission.

Q. And not by the local authorities?

A. No, sir.

Q. And that was true in 1915, was it not?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

59 A. Yes, sir.

Q. You said that all the cars operated over the Erlanger line at the time covered by the indictment and during the entire history of the company, had been operated continuously from the southerly end of the line to Fountain Square or some other point in Cincinnati. Is it not a fact that the majority of passengers carried on said cars, were passengers traveling between Cincinnati, in Ohio, and some point in the State of Kentucky?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir, Eighty (80) percent of the business of the Ft. Mitchell line, is through business.

Q. Are you able to state the average proportion of colored passengers carried on that car line?

(Objected to by Commonwealth; objection sustained. Defendant excepts and avows that if the witness were permitted to testify, he would say that the average proportion of colored passengers carried upon this line would not exceed six (6) percent at any time and that on a large portion of the trips, there were no colored passengers whatever.)

Q. Do the Erlanger cars stop at all road crossings on the line, between Covington and the end of the line?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

60 A. Yes, sir.

Q. Any passenger that wants to get on or off the car at any road crossing, the car stops for them, does it not?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir.

Q. Just like they do in Newport, Covington and Cincinnati?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir.

Q. Has the company at any time ever operated any Freight cars over this line?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. No, sir.

Q. Has it ever carried any freight or express matter?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. No, sir.

Q. Has it ever done any business except the carrying of passengers for a five (5) cent fare, as aforesaid?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. No, sir.

Q. Are the cars used on that line, any different from any car used on any other part of the system?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. No, sir.

61 Q. Are they interchanged every day with cars used on other lines of the system?

(Objected to by Commonwealth; objection overruled; Commonwealth excepts.)

A. Yes, sir.

The Commonwealth moves that all of the answers to the questions to which objections were made, be excluded; motion is overruled. Commonwealth excepts.

Redirect examination.

By Mr. Blakely:

Q. Mr. Laffoon, it is true is it not that the territory through which these cars operate, over the Cincinnati, Covington and Erlanger Railway's tracks, is a densely populated community?

A. Well, it is being developed rather rapidly.

Q. It is true that people live along the right of way, is it not?

A. Yes, sir.

Q. From one end of the line to the other?

A. Yes, sir.

The Commonwealth offers in evidence a copy of the petition and answer, in the case of Sarah O. Devou vs. The Cincinnati, Covington and Erlanger Railway Company, No. 5851. Objected to by defendant; objection overruled. Said petition and answer are admitted in evidence over the objections and exceptions of the defendant.

Q. Mr. Laffoon, I hand you a copy of the petition, in the case of

Sarah O. Devou vs. The Cincinnati, Covington and Erlanger Railway Company, and also an answer filed by that company, the action being then pending in the Kenton Circuit Court, being No. 5851, and ask you if the defendant company mentioned in this petition, and answer, is the same company which is defendant to this indictment or in this indictment?

(Objected to by defendant.)

Q. Is it not a fact that the Cincinnati, Covington and Erlanger Railway Company mentioned in this petition and answer, is the same Cincinnati, Covington and Erlanger Railway Company referred to in this indictment?

A. Yes, sir.

Said copy of petition and answer in the case of Sarah O. Devou vs. The Cincinnati, Covington and Erlanger Railway Company No. 5851, is filed and marked Exhibit "H." A copy of same is attached hereto.

Q. Mr. Laffoon, this car, No. 309, did not have constructed within it any partition of any kind for the separation of white and colored passengers, did it?

A. No, sir.

Q. The only partitions in that car were the partitions separating the Conductor from the body of the car and the motorman, and separating the motorman from the body of the car and the conductor, is that right?

A. Yes, sir.

EXHIBIT "H."

Kenton Circuit Court.

5851.

SARAH O. DEVOU, Plaintiff,

vs.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY CO., Defendant.

Petition in Equity.

63 The plaintiff, Sarah O. Devou, says that she is the owner and in possession of the following described real estate and property in Kenton County, Kentucky, described as follows, to-wit:

Commencing at a point "A" on the south side of Montague Street and East line of Devou land; thence N. 67° W. 230 feet to a point "B"; thence S. 36° W. 160 feet to a point "C"; thence N. 62° W. 90 feet to a point "D"; thence S. 27° W. 170 feet to a point "E"; thence S. 18° W. 445 feet to a point "F" (being an intersection point of right of way and the West boundary line of the Devou lands) thence

N. 29° E. 445 feet to a point "G"; thence N. 38° 30' E. 100 feet to a point; thence N. 61° E. 100 feet to a point thence N. 79° E. 100 feet to a point; thence N. 86° E. 100 feet to a point; thence S. 80° E. 35 feet to a point "H"; thence N. 23° 30' E. 30 feet to a point "A" the place of beginning, containing one acre. Plaintiff says that the defendant, The Cincinnati, Covington and Erlanger Railway Company is a corporation organized under the general laws of the state of Kentucky, and for the avowed purpose of constructing and operating a line of railway operated by electric power from the city of Covington, Kenton County, Kentucky, to the town of Erlanger, Kenton County Kentucky, a distance of about seven miles, and plaintiff now files herewith as part hereof a copy of said articles —

64 incorporation.

Plaintiff states that said defendant is now seeking and threatening, entirely without authority and in violation of the constitution and laws of the state and of the laws of the United States, to take possession of said real estate and property heretofore described, under and by virtue of certain condemnation proceedings instituted in the Kenton County Court of Kentucky. Plaintiff says that said Kenton County Court of Kentucky was without jurisdiction in said condemnation proceedings, which proceedings are now on file in this Court, having come up on appeal from the Kenton County Court, and are now referred to and made part hereof.

And plaintiff says that said line of railway which the defendant company proposes to build, and for which purpose they are seeking to obtain the possession of plaintiff's land herein is merely a line of city and suburban street railway operated by electric power, and is what is generally known as a traction line, and that said defendant company proposes to run said line of electric railway from Erlanger to Covington and from thence to Cincinnati over the tracks and lines of the South Covington and Cincinnati Street Railway Company, or the Cincinnati, Newport and Covington Railway Company, lines of electric street railway operated and running over the streets of Covington, Kentucky, and Cincinnati, Ohio, and that defendant does not expect and will not operate a steam railroad such as is contemplated by the Statutes of Kentucky, and will only operate what is commonly known as an electric traction line, and will have

65 no engineer or train crew, other than a motorman and conductor, as is usually used by street railways, and will not use spark-arresters or erect ticket offices or safety gates or provide flagmen, and will not in any way or manner be subject to any of the provisions of article five, subdivision- One, Two, Three, Four and Five, (Sections 763-842) of the Kentucky Statutes, and that said defendant corporation has no authority in law to condemn real estate or property for the purpose of an electric street or traction railway, such as it contemplates to operate, and that defendants never did, and does not now contemplate, purpose or intend using the premises herein sought to be condemned, for the purpose for which the Statute under which they attempted said condemnation proceedings authorized the condemnation of land, and plaintiff says that such attempted

taking for the purposes herein set out is contrary to and in violation of the Constitution and laws of the State of Kentucky, and contrary to and in violation of the Constitution and laws of the United States, and plaintiff says that said Kenton County Court of Kentucky had no jurisdiction, and that said alleged condemnation proceedings are null and void, and said threatened and attempted taking of plaintiff's property is entirely without authority.

Plaintiff says that unless said defendant be enjoined and restrained from the taking possession of or interfering with said property she will suffer great and irreparable damage not reparable at common law.

66 Wherefore, Plaintiff prays for a restraining order and temporary injunction against the defendant corporation, restraining and enjoining defendants, — its servants or agents, from taking or attempting to interfere with Plaintiff's possession of, the real estate herein set out and that on final hearing said defendant, its servants and agents be perpetually enjoined from interfering or attempting to interfere with plaintiff's peaceful possession of the real estate herein described, and finally plaintiff prays for costs and all other equitable relief.

(Signed)

FURBER AND JACKSON,
Attorneys for Plaintiff.

STATE OF KENTUCKY,
County of Kenton:

The Plaintiff, Sarah O. Devou, being first duly sworn says that all statements in the foregoing petition are true as she believes.

Plaintiff further says that the injunction applied for herein has not been refused by the Kenton Circuit Court, nor by said Court, nor by any Circuit Judge.

(Signed)

SARAH O. DEVOU.

Subscribed and sworn to before me by Sarah O. Devou this 30th day of December, 1901.

(Signed)

HERBERT JACKSON,
Notary Public, Kenton County, Ky.

67 We, the undersigned, Sarah O. Devou and Wm. P. Devou, and each of us authorize and empower Herbert Jackson as our attorney in fact to sign our and each of our names to such injunction bond, or other bond, as may be necessary in the foregoing action of Sarah O. Devou vs. the Cincinnati, Covington and Erlanger Railway Company.

Witness our hands this 30th. day of December, 1901:

(Signed)

SARAH O. DEVOU.

(Signed)

WM. P. DEVOU.

Kenton Circuit Court.

No. 5851.

SARAH O. DEVOU, Plaintiff,

VS.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Defendant.

Answer.

Now comes the defendant and for answer to the petition and the amended petition herein says it admits it is a corporation organized under the general laws of the State of Kentucky, but denies that it is organized for the avowed purpose of constructing and operating a line of railway operated by electric power from the city of Covington, Kenton County, Kentucky to the town of Erlanger, Kenton County, Kentucky. It admits that it is seeking to take possession of the land of the plaintiff by virtue of condemnation proceedings in the County Court of Kenton County, Ky., but it denies that said Kenton County Court was without Jurisdiction in said Proceedings.

It denies that said line of railway which it proposes to build, and for which it is seeking to obtain possession of plaintiff's land, is merely a line of city and suburban street railway operated by electric power. It denies that it is what is generally known as a traction line. It denies that it proposes to run said line of electric railway over the tracks and lines of the South Covington & Cincinnati Street Railway Company from Covington to Cincinnati. It denies that it will not operate a steam railroad, such as is contemplated by the Statutes of Kentucky. It denies that it will only operate what is commonly known as an electric traction line, denies that it will not use spark-arresters as provided by the statute. It denies that it will not erect ticket offices or safety gates, or provide flagmen, and denies that it will not in any manner or way be subject to the provisions of Article 5, subdivision- 1, 2, 3, 4, and 5, of the Kentucky Statutes. It denies that it does not now contemplate, purpose or intend using the premises herein sought to be condemned for the purpose for which the statutes authorize the condemnation of land. It denies that its action is in violation of the Constitution and laws of the State of Kentucky, or in violation of the Constitution and laws of the United States. It denies that the property sought to be condemned is within the city limits of Covington, Kentucky, and denies that it is neither necessary to nor for, public use. It denies that it is not authorized to operate within the city limits of the city of Covington.

Further answering, defendant says that it is a corporation organized under the general railroad statutes of the State of Kentucky, being article 5 of chapter 32 of the revised Statutes of Kentucky;

that, under its articles of incorporation, it is authorized to operate a railroad by electricity, steam or other power, and that under the statutes of Kentucky, it is authorized to construct a railroad, that it has been unable to contract with the owner of the land described in the petition which land is necessary for its use for the purpose of said railroad, that it proposes to construct its said railroad from the city of Covington to the town of Erlanger, and to conform in all respects with the law of Kentucky applicable thereto. It alleges that it has heretofore applied to the County Court to appoint Commissioners to assess the compensation and damages to which the owner of said land may be entitled, filing therewith a particular description of the land sought to be condemned; that said commissioners did award the owner of the said land the value of the land taken, and such damages as resulted to the adjacent lands of the owner; that the plaintiff filed exceptions to the said report, and also filed an answer containing in substance the allegations of the petition and amended petition herein, denying the power of this defendant to condemn land, denying that said land was necessary to the use of this defendant for the purpose of said railroad, and denying that the defendant proposed to construct

70 a railroad in accordance with the laws of the State of Kentucky, that this defendant filed a reply denying the allegations of said answer; that thereupon the said County Court found for this defendant upon the issues of fact said forth in said pleadings aforesaid; and the exceptions to the report of the Commissioners were submitted to a jury and the evidence heard and a verdict rendered; that thereupon judgment was entered in accordance with said findings and the verdict, and by reason thereof, this defendant became entitled to the possession of the land, as aforesaid; that it paid the costs in said County Court and duly tendered to the plaintiff herein the amount of the verdict, and upon her refusal to accept the same, it paid the said amount into Court; and defendant alleges that it is now entitled to the possession of the land.

Wherefore, having fully answered, defendant prays that said petition be dismissed, and that it go hence with its costs.

(Signed) ERNST, CASSATT & McDOUGALL,
Attorneys for Defendant.

71 STATE OF OHIO,
County of Hamilton, ss:

John A. Simpson, being duly sworn, says that he is the president of the defendant company; and that the facts stated and allegations made in the foregoing answer are true, as he verily believes.

(Signed) JOHN A. SIMPSON.

Sworn to before me and subscribed in my presence this 28th day of January, 1902.

(Signed)

FRANK W. COTTLE,
Notary Public, Hamilton Co., Ohio.

And this is all the testimony offered or introduced at the hearing of this cause.

Thereupon came the defendants and each made and filed the following motion:

Now comes the defendant, at the close of all the evidence, and moves the Court for the dismissal of the indictment and the acquittal of the defendant on the following grounds:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

72 2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein, and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article 1, Section VIII, of the Constitution of the United States.

3. That defendant was not at the time covered by the indictment, running or otherwise operating a railroad within the meaning of the Statute of Kentucky upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence.

Said motion was overruled as to each defendant, to which each of said defendants duly excepted, and the cause was thereupon submitted.

73 I, A. B. Walker, Official Stenographer of the Kenton Circuit Court, Criminal, Common Law & Equity Division, do certify that the foregoing is a true and complete transcript of the evidence and proceedings in the foregoing causes.

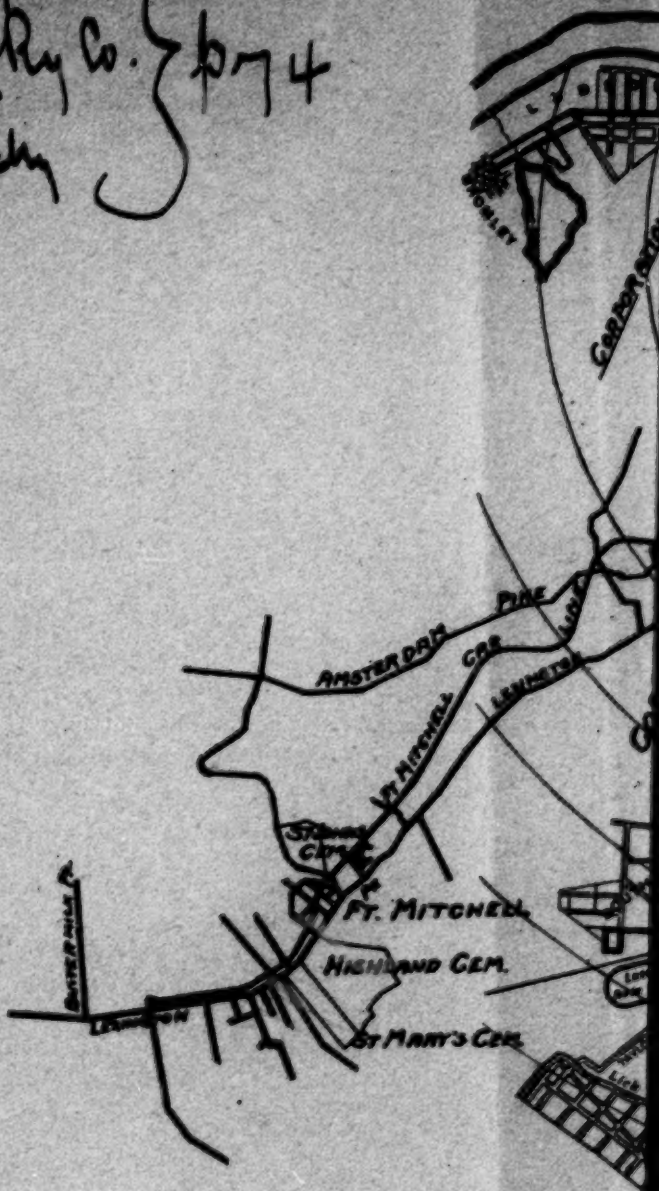
Witness my hand this 14th, day of April, 1917.

A. B. WALKER,
Official Stenographer, Kenton Circuit Court,
Criminal, Common Law, & Equity Division.

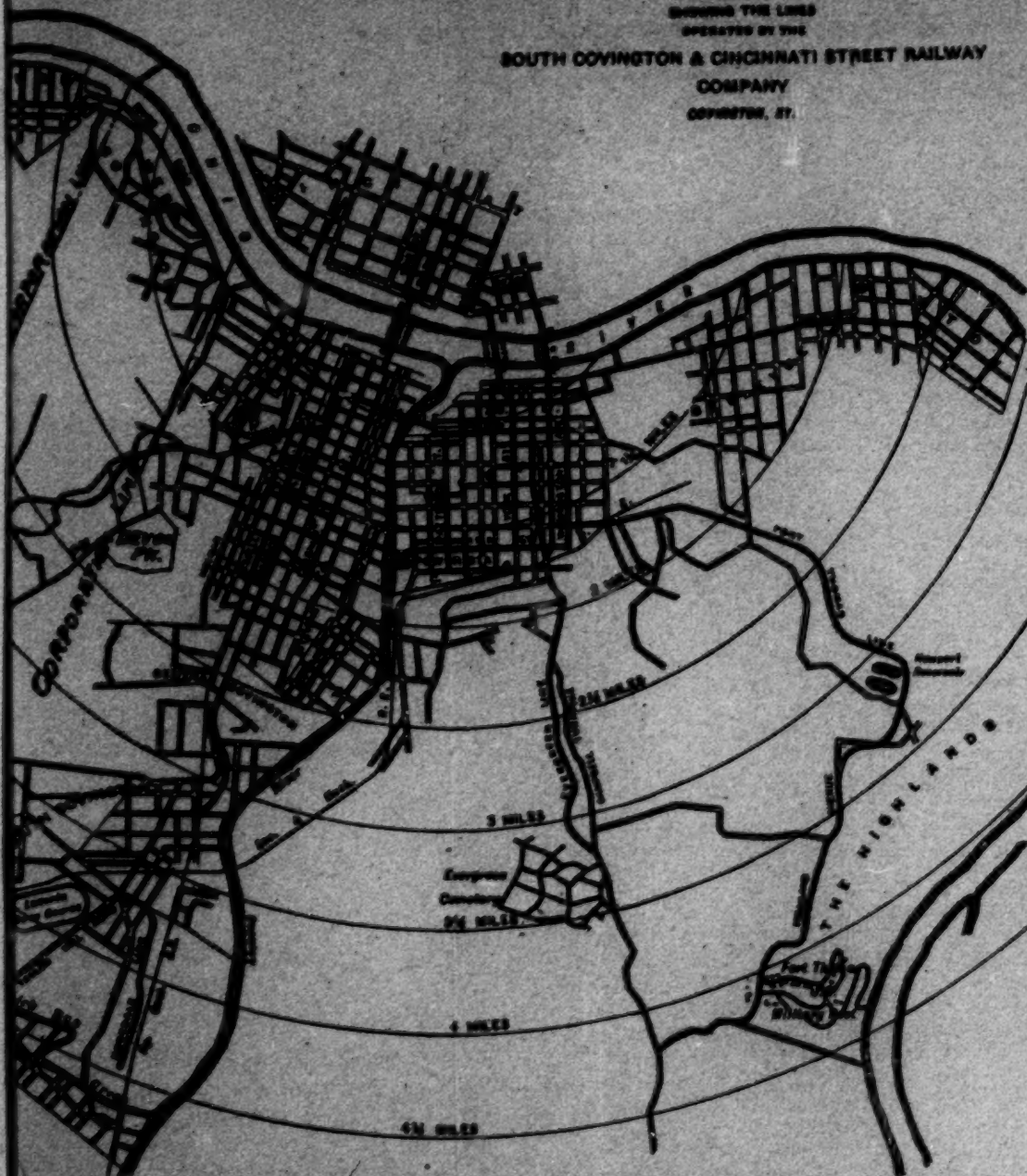
The foregoing Bill, containing all the testimony given and all offered, including Exhibits "A" to "H," both inclusive, and all steps and proceedings of every kind taken in the trial of said causes, was this 24th day of July, 1917, produced and tendered in Open Court by the Defendants and it was by the Defendants then and there moved that the same be approved and signed. And the said Bill is examined and found to be correct, and approved and signed by the Judge, and it is ordered to be filed and made a part of the record without being spread upon the Order Book, this 27 day of July, 1917.

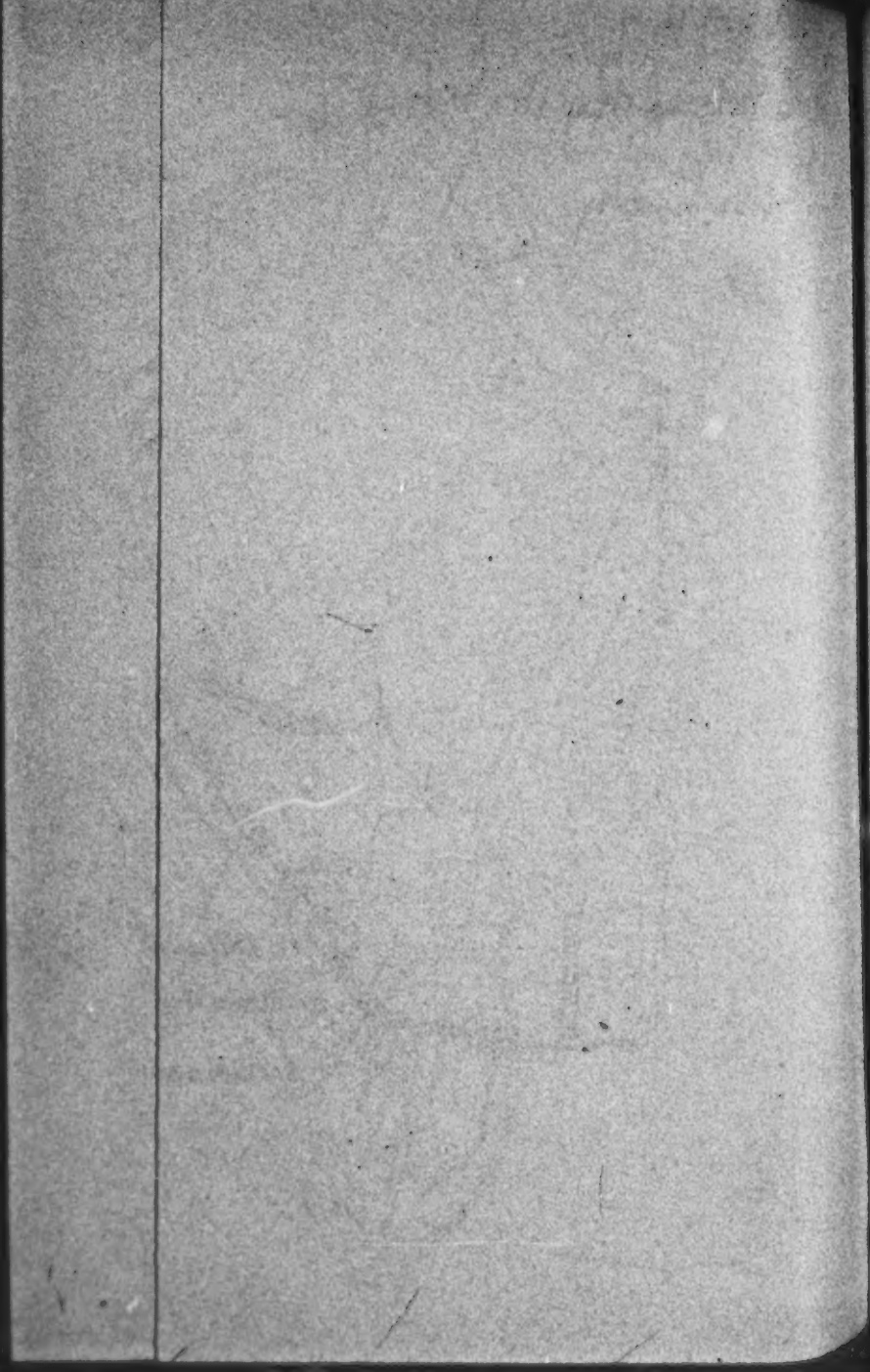
By agreement of parties the foregoing Bill shall be taken as the Bill of Evidence and Exceptions in each of said causes and may be filed and so marked in each cause.

no. 757.
S.E. & Sky Co. } pg 4
Kentucky
"S"



MAP
SHOWING THE LINES
OPERATED BY THE
SOUTH COVINGTON & CINCINNATI STREET RAILWAY
COMPANY
COVINGTON, KY.





Witness the hand and seal of the Court.

F. M. TRACY,
*Judge Kenton Circuit Court, Criminal,
Common Law, & Equity Division.*

(Here follows map marked p. 74.)

Be it remembered that at a Court of Appeals held in and for the Commonwealth aforesaid at the Capitol at Frankfort, on the 21st day of December 1917, the following Order was entered, to-wit:

Kenton.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY

VS.

COMMONWEALTH.

Came the appellant by counsel, and filed notice, and grounds and moved the Court to grant an oral argument herein, which motion is submitted.

The motion for oral argument filed by the foregoing order is in words and figures, following to-wit:

Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY Co., Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

Notice of Application for Oral Argument.

You are hereby notified that counsel for appellants have this day filed a motion for oral argument in the above entitled cases.

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE,
Attys. for Appellants.

Covington, Ky., December —, 1917.

Service of the above notice is hereby acknowledged and the undersigned consents to the granting of the motion.

STEPHENS L. BLAKELY.

78 Court of Appeals of Kentucky,

SOUTH COVINGTON & CINCINNATI STREET RAILWAY Co., Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY Co., Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

Application for Oral Argument.

Now come the appellants and move the court that the above entitled cases be passed for oral argument and be set for hearing at the convenience of the court.

Statement.

These cases are appeals from the Kenton Circuit Court. They were heard together in the court below and by stipulation filed in this court are heard together here.

79 Appellants were charged by simultaneous indictment in the Kenton Circuit Court with a violation of Section 795 of the Kentucky Statutes, which is in part as follows:

"Any railroad company or corporation * * * running or otherwise operating railroad cars or coaches * * * who may be now or may hereafter be engaged in running or operating any of the railroads of this state either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railway.

It is not contended that the section quoted would of itself apply to either of the appellants, but it is claimed to be made applicable by Section 842a, paragraph 1, of the Kentucky Statutes, which is as follows:

"All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, *so far as practicable*, and shall have the same rights, powers and privileges as is now granted to or conferred upon railroad corporations existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted." (*Italics ours.*)

A jury was waived and the law and facts submitted to the court which found both defendants guilty.

The appellant, The South Covington & Cincinnati Street Railway Co. is a street railway company organized under a special charter granted January 25, 1876, and having authority to construct and

operate street railways in the City of Covington and vicinity. Since the time of its organization it has been engaged in the operation of street railway lines in Covington and Newport and adjacent towns and territory, as appears from a plat attached to the opening brief for appellants.

The appellant, Cincinnati, Covington & Erlanger Railway Co. is a corporation organized under the general railroad laws of the State of Kentucky prior to the passage of #842a above referred to, and having authority to construct and operate an electric railway from the City of Covington to the town of Erlanger, a distance of about six miles, and to such further point beyond Erlanger as may be determined.

The road of the Erlanger Company has been constructed from the City of Covington to a point just beyond the suburban town called Ft. Mitchell, a total distance of 4.75 miles.

The South Covington & Cincinnati St. Ry. Co. furnished the money to build the road and at the time covered by the indictment was operating on said road a branch or part of its street railway system, operating its ordinary street cars by continuous trip over said line and through Covington and Cincinnati, charging a five cent fare, stopping at all street corners and road intersections, giving universal transfers and carrying no freight or express matter.

It seems clear from the Statutes quoted that separate coaches or compartments for colored passengers are required only in the case of companies "engaged in running or operating any of the railroads of this State".

81 This court held in *Louisville R. R. Co. vs. Commonwealth*, 130 Ky. 738, that the Statute applies to an interurban railroad but does not apply to a "street railway operating within the territory to which its charter confines it".

It was also held in that case that the test of guilt was the actual character of the operation and not the charter power of the defendant.

In the cases at bar the Commonwealth did not show, nor did it appear that at the time covered by the indictment an interurban railroad was being operated over the tracks in question by either company, but both companies were found guilty, apparently on the theory that as the Erlanger Company which owned the tracks, was authorized to operate an interurban railroad, any company operating over its tracks was bound to furnish separate coaches or compartments for colored people irrespective of the character of the actual operation.

The judgments below seem to be directly at variance with the principle of the decision of this court in *Louisville R. R. Co. v. Commonwealth*, 130 Ky. 738, and if applied generally would work a great hardship not only upon appellants, but upon other street railway systems which have extended some of their lines into outlying suburban territory.

Because of the practical hardship of the judgments below and what we believe to be the erroneous construction of the statutes,

and also because of the importance of this question in the State at large, we request that an oral argument be granted.

82

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE,
Attys. for Appellants.

83

Be it remembered that heretofore, to-wit, at a Court of Appeals held as aforesaid on the 7th. day of January, 1918, the following order was entered, to-wit:

Kenton.

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY

vs.

COMMONWEALTH.

The Court being sufficiently advised the motion for oral argument is sustained, and the case continued until the Spring Term for Argument.

Be it remembered that at a Court of Appeals held as aforesaid on the 24th. day of May 1918, the following order was entered to-wit:

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY

vs.

COMMONWEALTH KENTUCKY.

This case coming on to be heard, was argued by Stephens L. Blakely for the Appellee, and A. J. Cassatt for the Appellant, and submitted.

Be it remembered that at a Court of Appeals, held in and for the Commonwealth of Kentucky at the Capitol at Frankfort, on the 27th day of September 1918, the following order and Judgment was entered, to-wit:

84 Kenton Circuit Court, Criminal, Common Law, and Equity.

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

The Court being sufficiently advised, it seems to it, there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed, and that the appellee recover of the appellant 10 per cent damages on the

amount of the Judgment superseded herein, which is ordered certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And at the same time the Court delivered an opinion herein in words and figures as follows, to-wit:

85 Court of Appeals of Kentucky, September 27, 1918.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee,

Appeal from Kenton Circuit Court.

and

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Kenton Circuit Court.

Opinion of the Court, by Judge Hurt, Affirming in Each Case.

These appeals from the Kenton Circuit Court, are by agreement heard and determined together. The actions were heard and decided together below and without the intervention of a jury. The Cincinnati, Covington & Erlanger Railway Company is a corporation organized under the general laws for the incorporation of railroad companies in this state, and by the terms of its charter, it is authorized to construct, maintain and operate a railway "not exceeding ten miles in length, with a single or double track
86 and with all the usual convenient appendages and appurtenances thereunto belonging." The articles of incorporation provide, that the railway to be constructed and operated is from the city of Covington to the town of Erlanger, and to such further point beyond the town of Erlanger as may hereafter be determined upon, and over and along and upon such bridges, streets, highways, roads, and such private property, as the company may, by due process of law, acquire the right to lay its tracks upon. The motive power to be used in the operation of its road, was to be electricity or other improved methods of rapid transit. The corporation was duly organized by the election of officers and directors, and its organization has been kept up by a full complement of officers and directors, until the present time. The corporation was created and organized

in the year 1899, and shortly, thereafter, the construction of the road began at Montague Street, about six hundred feet within the corporate line of the city of Covington and had been, before the finding of the indictment against it, continued to a point on the Lexington & Covington turn pike, near the intersection of the Butler Milk Pike, in the direction of Erlanger, and for a distance of nearly five miles from its beginning point. On the way, it passes the town of Fort Mitchell, which contains a population of from two hundred and fifty to four hundred persons. The line of its road extends, at places over private property, and to condemn which for its use, it invoked the power of eminent domain.

87 The South Covington and Cincinnati Street Railway Company, was created by and organized under a charter granted it by the General Assembly of the State of Kentucky, on the 25th. day of January 1876, and this charter was amended by acts of the General Assembly, enacted on March 13, 1878, and April 5, 1878. By its charter as amended, it was given authority "to construct, operate and manage street railways in the city of Covington and vicinity," "and along such streets and public highways in the city as the council shall grant the right of way to": "and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of": "and it may at any time, by agreement, purchase, lease, consolidate with, acquire hold or operate any other street railway, or intersect therein, in Covington, Cincinnati, Newport or vicinity," etc. It in some way became the owner of all the stocks of the Cincinnati, Covington and Erlanger Railway Company, except the shares of stock, which were owned by the *directions* of the latter company, and which were necessary under the law to be held by the directors, in order to make them eligible for the positions of directors. The officers and directors of each of the corporations have been substantially the same from the creation of the Cincinnati, Covington & Erlanger Railway Company until the present time. The two corporations have held offices, at all times, in the same building, and they have operated, under the same general management. The officers, and directors of each corporation, often times composed for the most part of the same persons, have at all times, been well acquainted with the business affairs and purposes of each corporation. The intimacy between the corporations has been such, that it has not been considered necessary to reduce to writing any contracts, agreements, or understandings between the two, as to the use of the road of the junior corporation and the rights under its charter, by the elder corporation. The above facts are shown by the evidence, and the further fact, that the elder corporation operating in the name of the junior, actually constructed its road, and has been operating it from the beginning, being the owner of the cars, which are operated upon the road. The motive power is electricity and is the property of the elder corporation. The cars operated upon the road are such as are ordinarily used upon street railroads, and such as the elder corporation uses upon the street railroads of its system. A fare of five cents is charged for passage from any point upon the road of the Cincinnati, Covington

88

and Erlanger company, to any point on the system of the South Covington & Cincinnati Street Railway Company and from one point to another upon the entire system of the latter company, and transfers are given for all connecting lines. Many persons, who take passage upon the line of the Cincinnati, Covington & Erlanger
80 Railway Company, at its terminus, near Erlanger and at other places along its line, are transported without change of cars, into Cincinnati, in the state of Ohio, as it connects with the lines of the South Covington & Cincinnati Street Railway Company, at its terminus, in the city of Covington. Separate coaches, nor separate compartments in the same coach, are not provided for the white and colored passengers upon the road of the Cincinnati, Covington & Erlanger Railway Company. The coaches used will seat about thirty-two persons and the persons of both races occupy them, together.

Each of the appellant companies was indicted for a violation of Section 795, Ky. Stats., commonly known as the "Separate Coach Law." The South Covington & Cincinnati Street Railway Company was charged with the offense of operating railroad coaches or cars, upon the railroad of the Cincinnati, Covington & Erlanger Railway Company, and failing to furnish separate coaches for the transportation of white and colored passengers, or coaches with separate compartments for the white and colored passengers, and without the coaches or compartments bearing in a conspicuous place words indicating the race for which it was set apart. The indictment charged that it operated the cars upon the road as the lessee of the Cincinnati, Covington & Erlanger Railway Company. The latter company was charged with having given authority to the former company to operate the cars upon its road, in the unlawful manner above described, and with having leased the road with the knowledge
90 that the lessee was to so operate the road. Upon a trial of the two prosecutions, together, before the court, a jury having been waived, each of the appellants was found guilty, and its punishment fixed at a fine of \$500.00. The motion of each for a new trial was overruled, and they have appealed.

The grounds for a new trial, which were, also, embraced in a motion before judgment to dismiss the indictment, in the nature of a motion for a directed verdict, are as follows:

(1) The statute, under which the indictments were made and drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article 1, Section 8, of the Federal Constitution.

(2) The statute, under which the indictments were made, if held applicable to the case made by the indictments and the evidence, is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article 1, Section 8, of the Federal Constitution.

(3) The defendants were not, at the time, covered by the indictments, running or otherwise operating a railroad within the meaning of the statute.

(4) The evidence was insufficient to support the findings.

(a) The contention, that Section 795, Ky. Stats., under which the indictments and convictions were had, is in violation of any provision of the Federal Constitution has been determined to
 91 the contrary, both, by this court and the Supreme Court of the United States. *Ohio Valley Ry. Co. vs. Lander*, 104 Ky., 431; *Quinn vs. L. & N. R. R. Co.* 17 R. 811; *L. & N. R. R. Co., vs. Com.*, 18 R. 491; *Bailey v. L. & N. R. R. Co. vs. Com.* 19 R. 617; *Plessy vs. Ferguson*, 163 U. S. 537; *C. & O. Ry. Co. vs. Com.*, 21 R. 228; *C. & O. Ry. Co. vs. Kentucky*, 179 U. S. 388; *Louisville, etc. Ry Co. vs. Mississippi*, 133 U. S. 587; *L. & N. R. R. Co. vs. Com.*, 171 Ky. 355.

(b) Neither is the statute, *supra*, when applied to the indictments and evidence, in these cases, an unreasonable interference with, or regulation of interstate commerce, and violation of the commerce clause of the Federal Constitution. Each of the termini as well as all the stations of the Cincinnati, Covington & Erlanger Railway Company's road is within the state of Kentucky. The operation of a train upon this road, while it may be extended into another state, by connecting it with, and operating it upon the track of another company, the fact yet remains, that it is operated, the entire length of the line of the Cincinnati, Covington & Erlanger Railway Company, in the state of Kentucky. The offense charged and for which the defendants were convicted was the operation of the railroad, in an unlawful manner, within the state, and in violation of one of the measures enacted under the police powers of the state. *L. & N. R. R. Co. v. Com.* 171 Ky. 355, *supra*. The holding of this court, in *Chiles vs. C. & O. R. R. Co.* 125 Ky., 304, with regard to the application of the statute, under consideration, to the transportation of an interstate passenger is adhered to, and not overlooked.

92 (c) Touching the contention, that the appellants were not shown to have operated a railroad, within the meaning of the statute, it will be observed, that no exception is made in the statute of any kind of a railroad. The appellants insist, that the railroad, which was being operated, was a street railroad, and for that reason the statute has no application to it. This court has distinguished between a railroad, as used in the statute, and a street railroad, and has held that a street railroad company, in the operation of a street railroad or railway, is not required to furnish separate coaches or separate compartments, in its coaches, for the travel of white and colored persons. *Louisville Ry. Co. vs. Com.* 130 Ky., 738. The statute is very broad, in its terms and applies to all persons and companies, who may operate railroads, in this state, either in their own names or that of others, or whether they are the owners of the roads or leasees. This court, in the same opinion, in which it held that the statute was not applicable to street railroads, held that it did apply to interurban railroads. *Louisville Ry. Co. vs. Com.* *supra*. The agency by which a railroad is operated, whether steam or electricity, or the kind of cars and rolling stock, which is used in its operation, does not determine its character, as a street, interurban or trunk line railroad. In *Diebold vs. Ky. Traction Co.* 117 Ky. 146, it is said: "It seems to us that it is the charter of a company which places it in the class to

which it belongs, whether street railway or trunk railway, and not the character of motive power, which it employs," and again,

93 "Rather the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise and by the character and objects of its corporate creation as shown by its charter." The equipment and motive power of the class of railroads, which formerly were classed as street railroads, have so changed, as time has progressed, that the motive power and nature of their equipment has ceased to distinguish their class. In *Diebold v. Kentucky Traction Company*, *supra*, defining the term "street railway," it was said: "The term, 'street railway' as used in Section 163 of the State constitution, means and can only mean, applying to it a common sense interpretation, those street railroads, which before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street car tracks, for the use and convenience of the local public in a municipality—those street cars, that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings and at the termini of the street car companies' tracks within the municipality." In *Louisville & Portland Railroad Company vs. Louisville City Railway Company*, 2 Duv. 175, it is said: "A street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city." The weight of authority seems to confine those railroads, which are denominated street railroads to such as are constructed and operated

94 in the public streets of a city or town for the purpose of conveying passengers, from one place to another upon the streets, and within the limits of the municipality. These roads are distinguished from others, in that they acquire the franchise to use the streets of the municipality for the operation of their railroads from the municipality by a purchase of the franchise, after advertisement and at a public offering, while the interurban roads acquire their powers and privileges, among which is the power to exercise the right of eminent domain, from the state. Hence a railroad which extends from a city far into the country to other towns and municipalities and along and over public highways and over private property, to other towns and cities ceases to be a street railroad. The charter of the Cincinnati, Covington & Erlanger Railway Company demonstrates, that it receives all of its powers and privileges from the state, and under the general railroad laws of the state. It does not operate upon the streets of any municipality, except for a short distance at its beginning terminus, and the right to do this, it acquired from the state, subject to the municipality's right to regulate and control the manner of the use of the street. In the action of *Devou* against it, 128 Ky. 768, this court held that it was an interurban railway. It can not escape its responsibilities as an interurban railroad, by claiming or undertaking to operate it as a street railroad, or authorizing any one else to do so, because in the contemplation of the statute and the holdings of this court, exempting street

95 railroads from the application of Section 795, *supra*, it is impossible to operate a street railroad upon its road. It is con-

tended, that the South Covington & Cincinnati Street Railway Company is authorized by its charter to operate a street railroad upon the road of the South Covington Cincinnati, & Erlanger Railway Company but an examination of the charter does not seem to justify this contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute, in its operation. It is very clear that the South Covington, Cincinnati & Erlanger Railway Company, being an interurban road, with authority under its charter to build an electric railroad ten miles in length *Devou vs. South Covington, Cincinnati & Erlanger Ry. Co., supra*, it, if operating its own railway, would be amenable to the requirements of Section 795, *supra*, Section 842a, Ky., Statutes. In *Louisville Ry. Co. vs. Com.* 130 Ky., 738, discussing as to what railroads, Section 795, *supra*, were applicable to, it was said: "But interurban railroads are required by law to do so (to furnish separate coaches for white and colored passengers) and they can not evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroads." In *L. & N. R. R. Co. vs. Com.*, 120 Ky. 91, this court, discussing the obligations of railroad corporations, generally, said: "But, in any event appellee can not be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the state by transferring

its road or any part thereof to a lessee." Hence, so long as
 96 the Cincinnati, Covington & Erlanger Railroad, continues to be an interurban railroad, the persons or company operating railroad coaches upon it, are amenable to the requirements of Section 795, *supra*, and the corporation, itself, if it authorizes any other person or company to operate the railroad, contrary to such statute, will be amenable to punishment under it. *Louisville Railway Co. vs. Com. supra*.

The evidence shows that railroad coaches were operated upon the railroad, without compliance with the requirements of the law, as to separate coaches, or separate compartments therein, and that such operation was by the South Covington & Cincinnati Street Railway Company. The evidence *us*, also, such as to prove, that the Cincinnati, Covington & Erlanger Railway Company, either turned over its road to the Street Railway Company, with full knowledge that it would be operated contrary to law and for the purpose of the road being so operated, or else the two companies are jointly engaged in the operation of the railway. In either event it being conclusive, that the operation is being unlawfully made by the authority of the Cincinnati, Covington & Erlanger Railway Company. Under the facts proven, it is impossible to conclude, that the road is being unlawfully operated, without the full concurrence of the latter company, and it is therefore amenable to penalty, which is denounced in the Statute. *Louisville Ry. Co. vs. Commonwealth, supra*.

97 It is therefore ordered that the judgment in each case, be affirmed.

J. C. W. Beckham, Frankfort, Ky.; Ernst, Cassatt & Cottle, Cincinnati, O., for Appellants.

Stephens L. Blakely, Covington, Ky., for Appellees.

98 Be it remembered that afterwards, to-wit, on the 8th day of November, 1918, the appellant, South Covington & Cincinnati Street Railway Company, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors which is in words and figures as follows, to-wit:

99 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error (Appellant),

VS.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the proceedings and in the final judgment of the Court of Appeals of the State of Kentucky in the above entitled case there is manifest error in this, to-wit:

1. The Court of Appeals erred in holding that Sections 795, 797 and 842a of the Kentucky Statutes are not an unlawful and unreasonable interference with and regulation of interstate commerce in conflict with and in violation of the provisions of Article I, Section 8 of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that Sections 795, 797 and 842a of the Kentucky Statutes were applicable to the case made by the indictment herein and the evidence offered in support thereof, and not an unlawful and unreasonable interference with and regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

3. Said court erred in holding that the operation of the particular car, for which operation this plaintiff in error was found guilty of a criminal offence under Sections 795 and 797 of the Kentucky Statutes and punished for said alleged crime, was intrastate commerce, 100 over which the State of Kentucky had power to exercise the authority asserted by said sections of the Kentucky Statutes.

4. Said court erred in holding that the regulation and control asserted by appellee (defendant in error) over the acts and doings of appellant (plaintiff in error) as shown by the record, and upheld and approved by the judgment of the Court of Appeals, were not and are not unlawful and unreasonable interference with the regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

5. Said court erred in entering judgment for defendant in error (appellee) and in affirming the judgment in its favor of the Kenton Circuit Court.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff in Error.

Filed Nov. 8, 1918.

R. W. KEENON, C. C. A.

100½ [Endorsed:] Court of Appeals of Kentucky. The South
Covington and Cincinnati Street Ry. Co., Plaintiff in Error,
vs. The Commonwealth of Kentucky, Defendant in Error. Assign-
ment of Errors. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

101 And on said date, to-wit, November 8, 1918, there was filed
in the office of the Clerk of the Court of Appeals a Petition
for a Writ of Error and which is attached hereto and is as follows:

102 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COM-
PANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Ap-
pellee).

*Petition for Writ of Error from the Supreme Court of the United
States.*

To the Honorable W. E. Settle, Chief Justice of the Court of Appeals
of Kentucky:

Plaintiff in error, The South Covington and Cincinnati Street Rail-
way Company, alleges that on the 27 day of September, 1912, the
Court of Appeals of the State of Kentucky entered a final order and
judgment herein in favor of the defendant in error, The Common-
wealth of Kentucky, in which final order and judgment and the pro-
ceedings at the trial thereof in this cause certain errors were com-
mitted to the prejudice of the plaintiff in error, all of which will ap-
pear more in detail from the assignment of errors which is filed with
this petition.

That said Court of Appeals of the State of Kentucky is the highest
court in said State in which a decision in said suit could be had and
there was drawn in question therein the validity of statutes of, or an
authority exercised under said State, on the ground that the same
were repugnant to the Constitution of the United States and the
decision therein was in favor of their validity.

103 Wherefore plaintiff in error prays that a writ of error from
the Supreme Court of the United States may issue to the
Court of Appeals of the State of Kentucky for the correction of the
errors so complained of and that a transcript of the record herein,
duly authenticated, may be sent to the Supreme Court of the United
States.

THE SOUTH COVINGTON & CINCINNATI
STREET RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE,

Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 8 day of November, 1918, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of \$1200.00.

Dated at Frankfort, Kentucky this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals
of the State of Kentucky.

Filed in my office this 8th day of November, 1918.

RODMAN W. KEENON,
Clerk of the Court of Appeals
of the State of Kentucky,
By W. R. O'CONNELL,
Deputy Clerk.

103½ [Enclosed:] Court of Appeals of Kentucky. The South Covington & Cincinnati Street Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Petition for Writ of Error from the Supreme Court of the United States. Filed Nov. 8, 1918. R. W. Keenen, C. C. A. Ernst, Cascott & Cottle, Attorneys for Plaintiff in Error.

104 And on said date, to-wit, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States and the order allowing same by the Chief Justice of the Kentucky Court of Appeals, and which are attached hereto as follows, to-wit:

105 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky.

THE UNITED STATES OF AMERICA, et al:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a case which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity in the said State in which a decision could be

had in the said suit between The South Covington and Cincinnati Street Railway Company, a corporation under the laws of Kentucky, and the Commonwealth of Kentucky, wherein was drawn in question the validity of certain statutes of, or authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said The South Covington & Cincinnati Street Railway Co., as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, 106 if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of Dec., 1918, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said Supreme Court, the 8th day of Novr., in the year of our Lord One Thousand and Nine Hundred and 18.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk U. S. District Court, Eastern
District of Kentucky,
By CHAS. N. WIARD, D. C.

Allowed by

W. E. SETTLE,

Chief Justice Kentucky Court of Appeals.

Filed Nov. 8, 1918.

R. W. KEENON, C. C. A.

106½ [Endorsed:] Court of Appeals of Kentucky. The South Covington and Cincinnati Street Ry. Co., Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Court of Appeals of the state of Kentucky. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

107 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

VS.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Allowance of Writ of Error.

This cause coming on to be heard on the petition of The South Covington and Cincinnati Street Railway Company, plaintiff in error (appellant) for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said petition and the record in said matter and desiring to give the petitioner opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States, and the plaintiff in error having presented a bond in the sum of \$1200.00 with American Surety Co. of N. Y. as surety, to operate as its supersedeas, the same is hereby approved.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.

R. W. KEENON, C. C. A.

107½ [Endorsed:] Court of Appeals of Kentucky. The South Covington and Cincinnati Street Ry. Co., Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Allowance of Writ of Error. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

108 And on said date, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error Bond, and which is in words and figures as follows, to-wit:

109

Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Bond.

Know all men by these present, That we, The South Covington and Cincinnati Street Railway Company, as principal, and American Surety Co. of N. Y., as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Twelve Hundred Dollars, to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of November, 1918.

Whereas the plaintiff in error hath prayed a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE SOUTH COVINGTON & CINCINNATI
STREET RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE, *Its Attorneys.*
AMERICAN SURETY CO. OF N. Y.,
Per D. D. SMITH, *Atty. in Fact.*

I hereby approve the foregoing bond and surety this November 8th, 1918.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.

R. W. KEENON, *C. C. A.*

109½ [Endorsed:] Court of Appeals of Kentucky. The South Covington and Cincinnati Street Ry. Co., Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Bond. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

110 And afterwards, to-wit, on the 8th day of November 1918, there was filed in the Clerk's office of the Court of Appeals, the original citation with acceptance of service thereon, and which is hereto attached as follows:

111 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error (Appellant),

VS.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

To the Commonwealth of Kentucky:

Citation.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein The South Covington and Cincinnati Street Railway Company is appellant (plaintiff in error) and you are appellee (defendant in error) to show cause, if any there be, why the judgment against appellant (plaintiff in error) as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Settle, Chief Justice of the Court of Appeals of Kentucky, this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice.

Copy of the within citation received this 8th day of November, 1918, and service accepted.

CHARLES H. MORRIS,
Attorney General Kentucky.

Filed Nov. 8, 1918.
R. W. KEENON, C. C. A.

111½ [Endorsed:] Court of Appeals of Kentucky. The South Covington and Cincinnati Street Ry. Co., Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Citation. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

112 And afterwards, to-wit, on the 8th day of November, 1918, there was filed in the office of the Clerk of the Court of Appeals, the original præcipe with acceptance of service thereon, and which is hereto attached as follows:

113 The Court of Appeals of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, Appellant (Plaintiff in Error),

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee (Defendant in Error).

Precipe.

To the clerk of the Court of Appeals of Kentucky:

Please make a transcript of the record and proceedings in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, and include therein the following:

1. Entire record in this cause including bill of exceptions.
2. Opinion of Court of Appeals.
3. The assignment of errors, petition for writ of error, order allowing same, bond, order approving same, citation and return of service of same, this precipe and the return of service of same.

ERNST, CASSATT & COTTLE,
Attorneys for Above-named Appellant (Plaintiff in Error),
The South Covington & Cincinnati St. Ry. Co.

Copy of the above precipe received and service of same hereby accepted and acknowledged this 8th day of November, 1918.

CHARLES H. MORRIS,
Attorney General of Kentucky, Attorney for Appellee
(Defendant in Error), The Commonwealth of Kentucky.

Filed Nov. 8, 1918.

R. W. KEENON, C. C. A.

114 [Endorsed:] Court of Appeals of Kentucky. The South Covington and Cincinnati St. Ry. Co., Appellant, vs. The Commonwealth of Kentucky, Appellee. Precipe. Ernst, Cassatt & Cottle, Attorneys for Appellant.

115 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record in the case of South Covington & Cincinnati Street Railway Company vs. Commonwealth of Kentucky, with all things touching the same, as appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, Kentucky, on this the 20th day of November, 1918.

[Seal Court of Appeals, Kentucky.]

R. W. KEENON,
Clerk of the Court of Appeals of Kentucky,
By W. B. O'CONNELL, D. C.

Fee for this transcript 35.00.

Endorsed on cover: File No. 26,843. Kentucky Court of Appeals. Term No. 757. The South Covington & Cincinnati Street Railway Company, plaintiff in error, vs. The Commonwealth of Kentucky. Filed December 3d, 1918. File No. 26,843. *

carried through to destination without change for a single fare, those traveling interstate greatly exceeding in number those traveling wholly within the State making the requirement. P. 403. 181 Kentucky, 449, affirmed.

THE case is stated in the opinion.

Mr. Alfred C. Cassatt, with whom *Mr. J. C. W. Beckham*, *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for plaintiff in error.

Mr. Stephens L. Blakely, with whom *Mr. Chas. I. Dawson*, Attorney General of the Commonwealth of Kentucky, was on the brief, for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of the court.

The Railway Company was indicted for a violation of a statute of Kentucky which required companies or persons running or operating railroads in the State, to furnish separate coaches or cars for white and colored passengers.

The statute, as far as we are concerned with it, is as follows: all corporations, companies or persons "engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." [Ky. Stats., § 795.]

It is also provided that there shall be no difference or discrimination in the quality of the coaches or cars. A violation of the act is made a misdemeanor.

Interurban electric railroads are subject to the above provisions. We may say in passing that the railway company denies that it is interurban, but admits that the fact has been decided against it and accepts the ruling. It will be considered, therefore, as interurban and being so it was within the law and the charge of the indictment. The charge is that the company at the time designated "then and there had authority and was authorized to operate a line of railroad ten miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership and lease of and from the Cincinnati, Covington and Erlanger Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad ten miles in length in this County between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this Commonwealth, said defendant then and there operating said line of railroad, the construction of which by the Cincinnati, Covington and Erlanger Railway Company had theretofore been authorized." And having such authority and control of the line of railroad, the company violated the law of the State by not observing its requirement as to separate coaches.

The defense to the action was, and the contention here is, not that the facts charged are not true, but that the statute so far as it is attempted to be made applicable to the company is an interference with interstate commerce, and that the defense was made in the trial court in a motion to dismiss and for a new trial and also in the Court of Appeals.

In support of the contention it is stated that the company's principal business was interstate commerce—the

carriage of passengers between Cincinnati and the Kentucky cities across the Ohio River,—that the car in question was an ordinary single truck street car solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and a suburb about five miles distant, and that eighty per cent. of the passengers carried were interstate.

The reply made by the State, and expressed by the Court of Appeals, to the contention is that the railway company is a Kentucky corporation and by its charter was given authority "to construct, operate and manage street railways in the City of Covington and vicinity"; "and along such streets and public highways in the city as the council shall grant the right of way to"; "and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of." And further "it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or intersect therein, in Covington, Cincinnati, Newport or vicinity," etc.

The Court of Appeals further declared that the railway company became in some way the owner of all of the stocks of the Cincinnati, Covington and Erlanger Railway Company, and that the corporations are operated under the same general management, and "that the elder corporation operating in the name of the junior, actually constructed its road, and has been operating it from the beginning, being the owner of the cars, which are operated upon the road. The motive power is electricity and is the property of the elder corporation. The cars operated upon the road are such as are ordinarily used upon street railroads, and such as the elder corporation uses upon the street railroads of its system. A fare of five cents is charged for passage from any point upon the road of the Cincinnati, Covington and Erlanger Company, to any point on the system of the South Covington and Cincin-

nati Street Railway Company and from one point to another upon the entire system of the latter company, and transfers are given for all connecting lines. Many persons, who take passage upon the line of the Cincinnati, Covington and Erlanger Railway Company, at its terminus, near Erlanger and at other places along its line, are transported without change of cars, into Cincinnati, in the State of Ohio, as it connects with the lines of the South Covington and Cincinnati Street Railway Company, at its terminus, in the City of Covington." Separate coaches were not provided as required by the law.

These being the facts the Court of Appeals decided that there was no interference with or regulation of interstate commerce. "Each of the termini," the court said, "as well as all the stations of the Cincinnati, Covington and Erlanger Railway Company's road is within the State of Kentucky." And it was concluded that "the offense charged and for which the" railway was "convicted was the operation of the railroad, in an unlawful manner, within the State, and in violation of one of the measures enacted under the police powers of the State."

In answer and in resistance to the conclusion of the court, the railway company contends that it operates a railway between designated termini, one being in Kentucky and the other in Ohio, that the price of a fare may be the single one of five cents for the complete trip in the same coach taken at or terminating at the respective termini, and that therefore the car and passenger are necessarily interstate. Thus viewed they undoubtedly are, but there are other considerations. There was a distinct operation in Kentucky,—an operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U. S. 537. The

**SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY v. COMMONWEALTH OF
KENTUCKY.**

**ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.**

No. 252. Argued March 18, 19, 1920.—Decided April 19, 1920.

A state law requiring interurban railroad companies to supply separate cars or compartments for white and colored passengers, and punishing failure to do so, is not an unconstitutional burden on interstate commerce as applied to such a railroad, owned by a local corporation and lying wholly within such State, while in control of an allied street car company and in practice operated as part of a street-car system over which the cars are run to and from a city in another State (where such separation of races is illegal) and passengers are

Dist. Van Dusen and Foster, JJ., dissenting. 232 U. S.

regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands.

The cited case points out the equal necessity, under our system of government, to preserve the power of the States within their sovereignty as to prevent the power from interstate commerce within the National sovereignty, and an interstate railroad company deriving its powers from the State, and subject to obligations under the laws of the State, should not be permitted to exercise the powers given by the State, and escape its obligations to the State under the circumstances presented by this record, by running its tracks beyond the state line. But we need not extend the discussion. The cited case expresses the principle of decision and marks the limitation upon the power of a State and when its legislation is or is not an interference with interstate commerce. And regarding its principle, we think, as we have said, the act in controversy does not transgress that limitation.

Judgment affirmed.

MR. JUSTICE DAY, dissenting.

If the statute of the State of Kentucky, here involved, as construed by the decision under review imposes an unreasonable burden upon interstate commerce, the conviction should be reversed. To determine this question it is necessary to have in mind precisely what the charge was, and the nature of the traffic to which it was applied. The South Covington & Cincinnati Street Railway Company was charged with the offense of unlawfully running and operating a coach or car by electricity on a railroad track within the State of Kentucky, without causing or having a separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the use for which it was set apart, and without having its coach or car divided by a good and substantial

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wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart.

There is no conflict of testimony, and the record shows that the Company was engaged in the operation of a street railway system whose principal business was interstate commerce, carrying passengers between Cincinnati and Kentucky cities across the Ohio River; that the car in question, described in the indictment, was an ordinary single truck street car seating thirty-two passengers, about twenty-one feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and well-populated territory adjacent thereto, to a point near Fort Mitchell, a suburb, about five miles distant. Eighty per cent. of the passengers carried were interstate. Not to exceed 6 per cent. of the passengers carried at any time were colored and on a large proportion of the trips no colored passengers were carried.

The question for determination is: Whether under such circumstances the requirement of the statute of the State of Kentucky that railroad companies doing business in that State shall be required to furnish separate coaches and cars for the travel or transportation of white and colored persons or cars with compartments, as described in the indictment, is constitutional? The nature of the traffic of the South Covington & Cincinnati Street Railway Company was considered by this court in *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U. S. 537, and we held that the traffic between Kentucky and Ohio on the same cars, under the same management, and for a single fare constituted interstate commerce. (See 235 U. S. 545, and cases cited.) In that case we held that an ordinance of the City of Covington, which under-

DAY, VAN DEVANTER and PITNEY, JJ., dissenting. 252 U. S.

took to determine the number of cars and passengers to be carried in interstate transportation was invalid as a burden upon interstate commerce; and that, as to certain regulations affecting the safety and welfare of passengers, the ordinance was valid until Congress saw fit to regulate the interstate transportation involved.

It is true that a portion of the transportation involved in the present case is over the track of a railroad company organized under the laws of Kentucky. But that road had no cars, conducted no railroad operations, and its stock was owned and it was operated by the South Covington & Cincinnati Street Railway Company. The car, for which the indictment was returned, and the conviction had, was operated only in interstate traffic, and, whether over one road or the other, such operation was interstate commerce, and plainly within the authority of Congress. In the absence of congressional regulation the State had power to make reasonable rules, not burdening interstate commerce, which should be enforced until Congress otherwise enacted.

The question in this case then is: Was the application of this statute a reasonable regulation? The traffic consists in running a single car, of the character already described, from Fountain Square, Cincinnati, a distance of about six miles, to Fort Mitchell, a suburb of South Covington, Kentucky. How could this separate car or compartment statute be complied with? It is first suggested a separate car could be put on for the accommodation of colored passengers for the distance of the intrastate run on the Kentucky side of the river. In view of the nature of the transportation and the meagre patronage compared with the expense of such an undertaking, this method would be impracticable without interrupting travel and entailing a great loss upon the Company. Secondly, it is suggested, and this seems to be the weight of the argument, that cars could be constructed with a separate compartment for the few colored

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persons who ride in the car after it reaches or before it leaves Kentucky. It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Kentucky to Cincinnati, or going from Cincinnati to Kentucky on a through trip, would not be subject to the regulation. The few colored passengers traveling exclusively in the State of Kentucky in this car would thus be discriminated against by reason of the different privilege accorded to other colored passengers on the same car, a condition not likely to promote the peace or public welfare.

As this transportation is also subject to regulation in the State of Ohio (see § 12940, Ohio Gen. Code) and as by the laws of that State no such separation of passengers is permitted, it follows that upon the same trip the traffic would be the subject of conflicting regulations, calculated to be destructive of the public policy which it is supposed to be the design of this statute to promote; a condition which we said in *South Covington Street Railway Case*, *supra*, would breed confusion greatly to the detriment of interstate traffic.

This case is quite different from *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, in which the statute now under consideration was before the court, and wherein it was held that the law was valid when applied to a carrier operating an interstate road. The act was held to be separable, and capable of being complied with within the State by attaching a car for passengers traveling only within the State. That case presented quite a different situation from the operation of the single street car here involved.

The present indictment is for running an ordinary street car upon an interstate journey of only about six miles, with 80 per cent. of its travel interstate, and not over 6 per cent. of the passengers colored, and on many trips no colored passengers at all. As we have indicated, the attachment of the additional car upon the Kentucky side on so short a

journey would burden interstate commerce as to cost and in the practical operation of the traffic. The provision for a separate compartment for the use of only intrastate colored passengers would lead to confusion and discrimination. The same interstate transportation would be subject to conflicting regulation in the two States in which it is conducted.

It seems to me that the statute in question as applied to the traffic here involved is an unreasonable regulation and burdensome to interstate commerce, and, therefore, beyond the power of the State. I think the judgment should be reversed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY concur in this dissent.
